(10)

No. 90-113-CFX
Status: GRANTED

Title: Clinchfield Coal Company, Petitioner
v.
Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.

Docketed:
July 17, 1990

Court: United States Court of Appeals for the Fourth Circuit

Vide:
89-1714
90-114

Counsel for petitioner: Solomons,Mark E.

Counsel for respondent: Solicitor General, Wilson,Sherry Lee

See also:
90-114
90-172

Entry	Date	Note	Proceedings and Orders
1	Jul 17 1990	G	Petition for writ of certiorari filed.
2	Jul 17 1990		Appendix of petitioner filed.
3	Aug 16 1990		Order extending time to file response to petition until September 15, 1990 for the Solicitor General.
4	Aug 16 1990		Order extending time to file response to petition until October 1, 1990 for respondent Taylor.
5	Sep 17 1990		Brief of respondent Director, Office of Workers' Compensation Programs, etc. filed.
6	Sep 21 1990	N	Motion of petitioners in Nos. 89-1696, 90-113 and 90-114 and respondent BethEnergy Mines, Inc. in No. 89-1714 to consolidate these cases filed.
7	Sep 26 1990		Opposition of Respondent Taylor to motion of petitioner filed.
8	Sep 27 1990		Opposition of Harriet Pauley to motion of petitioner filed.
9	Sep 27 1990		Brief of respondent John A. Taylor in opposition filed.
10	Sep 27 1990	G	Motion of respondent John Taylor for leave to proceed in forma pauperis in No. 90-113 filed.
11	Oct 3 1990		DISTRIBUTED. October 26, 1990
12	Oct 29 1990		Motion of respondent John Taylor for leave to proceed in forma pauperis in No. 90-113 GRANTED.
13	Oct 29 1990		Petition GRANTED. The case is consolidated with 89-1714 and 90-114, and a total of one hour is allotted for oral argument.
			**********
14	Nov 9 1990	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
16	Nov 21 1990		Record filed.
		*	Certified copy of original record on appeal and proceedings, 4 volumes, received.
15	Nov 26 1990		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
17	Dec 13 1990		Brief of petitioners Clinchfield Coal Company and Consolidation Coal Company filed. VIDED.
18	Dec 13 1990		Brief amicus curiae of National Council on Compensation Insurance filed. VIDED.
19	Dec 13 1990		Brief of respondent Director, Office of Workers' Compensation Programs, etc. filed. VIDED.
20	Dec 13 1990		Brief amicus curiae of National Coal Association filed.

2 pp

No. 90-113-CFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
22	Dec 13 1990		Brief of petitioner Harriet Pauley filed. VIDED.
21	Dec 17 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 20, 1991. (1ST CASE)
23	Dec 27 1990	G	Motion of the Solicitor General for divided argument filed.
24	Jan 14 1991		Motion of the Solicitor General for divided argument GRANTED. The request of the claimants to be designated as respondents is granted. Justice Kennedy OUT.
25	Jan 14 1991		Brief of respondent Bethenergy Mines, Inc. filed. VIDED.
26	Jan 14 1991		Brief of respondent John A. Taylor filed. VIDED.
28	Jan 16 1991	X	Brief of respondent Albert C. Dayton filed. VIDED.
27	Jan 17 1991		CIRCULATED.
29	Feb 11 1991	X	Reply brief of petitioner Harriet Pauley filed. VIDED.
30	Feb 13 1991	X	Reply brief of petitioners Clinchfiled Coal Co. and Consolidated Coal Co. filed. VIDED.
31	Feb 13 1991	X	Reply brief of Director, Office of Workers' Compensation Programs filed. VIDED.
32	Feb 20 1991		ARGUED.

90-1 13

FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and JOHN A. TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
Arter & Hadden
Suite 400
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 775-7154

Counsel for Petitioner

QUESTIONS PRESENTED

This petition for a writ of certiorari asks the Court to resolve two questions deferred in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

1. Does 30 U.S.C. § 902(f)(2) require a mine operator to pay black lung disability benefits to certain former employees who do not have black lung disease or any related disability.

2. If 30 U.S.C. § 902(f)(2) prohibits a coal mine operator from defending a black lung claim by proving that a former employee does not have black lung disease or any related disability, then does 30 U.S.C. § 902(f)(2) violate the property rights of mine operators under the Due Process Clause of the Fifth Amendment to the Constitution of the United States by requiring them to pay benefits to certain black lung claimants absent any valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John A. Taylor is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner below and is a respondent here. The Clinchfield Coal Company ("Clinchfield") is the mine owner that last employed Taylor. Clinchfield was the respondent below and is the petitioner in this Court. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party-in-interest in black lung claims. 30 U.S.C. § 932(k).

Clinchfield is a wholly-owned subsidiary of The Pittston Companies.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Background	3
B. John Taylor's Claim	5
REASONS FOR GRANTING THE WRIT	7
I. THE CIRCUITS DISAGREE	8
II. THE DECISION BELOW IS CLEARLY WRONG	9
III. THE PRINCIPLES INVOLVED ARE IMPORTANT	15
CONCLUSION	16

TABLE OF AUTHORITIES

	PAGE
Cases:	
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	12
Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714)	7, 9
Broyles v. Director, Office of Workers' Compensation Programs, 824 F.2d 327 (4th Cir. 1987), *aff'd in part sub nom. Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988)	4, 6
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	14
County Court v. Allen, 442 U.S. 140 (1979)	15
Crowell v. Benson, 285 U.S. 22 (1932)	15
Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir.), *petition for cert. filed*, 58 U.S.L.W. __ (U.S. __, 1990) (No. 90-___)	5, 6, 7, 8
Hubert Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696)	7, 8, 9
Massachusetts v. Morash, 109 S. Ct. 1668 (1989)	12
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	15
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	12
Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988)	*passim*

	PAGE
Robinette v. Director, Office of Workers' Compensation Programs, No. 88-1144 (4th Cir. Apr. 27, 1990) (unpublished)	6
Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989)	6, 9
Constitutional Provisions:	
U.S. Const. amend. V	2
Statutes and Regulations:	
28 U.S.C. § 1254(1) (1988)	2
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988)	9
Section 401(a), 30 U.S.C. § 901(a) (1988)	2, 10
Section 402(b), 30 U.S.C. § 902(b) (1988)	10
Section 402(f), 30 U.S.C. § 902(f) (1988)	2, 13
Section 402(f)(1)(A), (D), 30 U.S.C. § 902(f)(1)(A), (D) (1988)	10, 13
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988)	*passim*
Section 413(b), 30 U.S.C. § 923(b) (1988)	2, 5, 11
Section 421, 30 U.S.C. § 931 (1988)	11
Section 422(a), 30 U.S.C. § 932(a) (1988)	5, 11
Section 422(c), 30 U.S.C. § 932(c) (1988)	2, 11
Section 422(g), 30 U.S.C. § 932(g) (1988)	16
Section 422(h), 30 U.S.C. § 932(h) (1988)	11
Section 422(k), 30 U.S.C. § 932(k) (1988)	ii
Section 423(a), 30 U.S.C. § 933(a) (1988)	11
Section 435, 30 U.S.C. § 945 (1988)	3
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978)	5, 10
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978)	10
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972)	10

	PAGE
Longshore Act, as amended, 33 U.S.C. §§ 901-950 (1988)	5
42 U.S.C. §§ 404-408 (1982 & Supp. V 1987)	5
Social Security Administration Regulations	
20 C.F.R. Part 410, Subpart D Appendix (1989)	12
20 C.F.R. § 410.412(a)(1) (1989)	13
20 C.F.R. § 410.416 (1989)	6
20 C.F.R. §§ 410.424-.426 (1989)	13
20 C.F.R. § 410.426(a) (1989)	13
20 C.F.R. § 410.490 (1989)	2, 4
20 C.F.R. § 410.490(b) (1989)	3, 8, 12
20 C.F.R. § 410.490(c) (1989)	9, 13
20 C.F.R. § 410.490(c)(1) (1989)	13
20 C.F.R. § 410.490(c)(2) (1989)	8, 13
Department of Labor Regulations	
20 C.F.R. Part 718 (1989)	3
20 C.F.R. § 727.203 (1989)	2, 3
20 C.F.R. § 727.203(a) (1989)	3
20 C.F.R. § 727.203(a)(3) (1989)	5, 8, 12
20 C.F.R. § 727.203(b)(2) (1989)	8
20 C.F.R. § 727.203(b)(3) (1989)	4, 5, 6, 8, 9
20 C.F.R. § 727.203(b)(4) (1989)	4, 5, 8
Miscellaneous:	
Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess. (1981)	3

	PAGE
Official Transcript, Proceedings Before the Supreme Court of the United States, *Pittston Coal Group v. Sebben*, (Consolidated Nos. 87-821, 87-827 and 87-1095) (U.S. Oct. 3, 1988)	4
A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* (1986)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and JOHN A. TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Clinchfield Coal Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 895 F.2d 178. (App. 4a-16a.) The order of the court of appeals denying petitions for rehearing filed by Clinchfield and the Government is unreported. (App. 1a.) The decision and order of the Benefits Review Board, United States Department of Labor, is unreported. (App. 17a-19a.) The Decision and Order of the Administrative Law Judge ("ALJ") — Rejection of Claim is unreported. (App. 20a-32a.)

JURISDICTION

The judgment of the court of appeals was rendered on February 5, 1990. The court of appeals enlarged the time for filing petitions for rehearing to and including March 16, 1990, (App. 2a-3a), and timely petitions were filed by Clinchfield and the Government. On April 20, 1990, the petitions for rehearing and the Government's suggestion for rehearing en banc were denied. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States. (App. 33a.)

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988). (App. 34a.)

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). (App. 35a-36a.)

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988). (App. 37a-38a.)

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988). (App. 39a.)

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1989). (App. 40a-42a.)

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1989). (App. 43a-45a.)

STATEMENT OF THE CASE

A. Background

In *Pittston Coal Group*, 109 S. Ct. 414, this Court invalidated a component of the U.S. Department of Labor's ("DOL") black lung "interim presumption" because it violated section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2). The offending provision in the DOL rule prohibited the invocation of this presumption by a claimant who established the existence of pneumoconiosis ("black lung" disease) by x-ray, biopsy, or autopsy evidence, unless it was also proven that the miner was employed in coal mine work for at least ten years. 20 C.F.R. § 727.203(a). A comparable "interim presumption" written by the Social Security Administration ("SSA")[1] permits invocation by a shorter term miner. 20 C.F.R. § 410.490(b). Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), states, "Criteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 [with SSA] . . . ." Because DOL's ten-year rule is more restrictive than SSA's rule, this Court invalidated the former.

---

[1] SSA's interim presumption was promulgated by the agency in 1972, for application in all black lung claims filed prior to July 1, 1973, and certain claims filed prior to January 1, 1974. 20 C.F.R. § 410.490(b). DOL's interim presumption was promulgated in 1978, for application in (1) claims then pending at DOL, (2) all claims previously denied by DOL, (3) certain claims previously denied by SSA, and (4) all new claims filed prior to DOL's congressionally mandated promulgation of new permanent eligibility regulations. 20 C.F.R. § 727.203; 30 U.S.C. §§ 902(f)(2), 945. DOL's new regulations became effective on April 1, 1980, and are applicable to all claims filed on or after that date. 20 C.F.R. Part 718 (1989). Approximately 424,000 claims were subject to review under the DOL presumption. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981). It is estimated that from 3,000 to 7,000 of these claims are still active.

There are several other differences between the two interim presumptions. In a case consolidated by this Court with *Pittston Coal Group*, the Fourth Circuit struck down not only DOL's ten-year rule, but also perceived differences between the DOL and SSA presumptions on the rebuttal side. *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub nom. Pittston Coal Group*, 109 S. Ct. at 425. The DOL presumption may be rebutted expressly by proof that the miner does not or did not have black lung disease or that the miner's disability or death was not, at least in part, related to coal mine employment. 20 C.F.R. § 727.203(b)(3), (4). Noting that the SSA rule did not expressly provide these rebuttal possibilities, the Fourth Circuit invalidated DOL's rebuttal rules under 30 U.S.C. § 902(f)(2). *Broyles*, 824 F.2d at 329.

In this Court, the mine operator petitioners in *Pittston Coal Group* and the Solicitor General also sought review of the Fourth Circuit's invalidation of DOL's rebuttal rules. Broyles, however, in briefs and at oral argument, conceded the validity of DOL's rebuttal rules, explaining that they were authorized by the Act apart from the language of 30 U.S.C. § 902(f)(2).[2] Consequently, this Court held: "Respondents' concession on the rebuttal provisions means that we are not required to decide the question of their validity [or the related due process questions raised by petitioners]." *Pittston Coal Group*, 109 S. Ct. at 423. In remanding *Broyles* to the Fourth Circuit, this Court instructed the court below to apply "criteria no more restrictive than § 410.490 only as to the affirmative factors for invoking the presumption of entitlement, and not as to the rebuttal factors, the validity of which respondents have conceded." *Id.* at 424.

[2] *See, e.g.*, Official Transcript, Proceedings Before the Supreme Court of the United States, *Pittston Coal Group v. Sebben* at 31-35 (Consolidated Nos. 87-821, 87-827, and 87-1095) (U.S. Oct. 3, 1988).

In John Taylor's case, the Fourth Circuit revived *Broyles* to invalidate DOL's "extra" rebuttal provisions, thus prohibiting the denial of Taylor's claim even though Taylor does not have black lung disease or any related disability. A second Fourth Circuit panel reached approximately the same result on the same day. *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir.), *petition for cert. filed*, 58 U.S.L.W. __ (U.S. __, 1990) (No. 90-___).[3]

Clinchfield files this petition for a writ of certiorari to seek a return to reason in this program.

B. John Taylor's Claim

Taylor's claim was originally filed on November 3, 1976, and was subject to review under the DOL interim presumption after enactment of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978). Following trial, the ALJ issued a decision and order denying benefits.[4] (App. 20a-32a.) The ALJ invoked the DOL interim presumption in light of arterial blood gas test results meeting the criteria published in DOL's rules. 20 C.F.R. § 727.203(a)(3). Turning to the rebuttal inquiry, the ALJ found most persuasive substantial medical evidence proving (1) that Taylor did not suffer from pneumoconiosis to any degree and (2) that Taylor's abnormal blood gas results were due exclusively to obesity and the effects of a long history of cigarette smoking. Since DOL's presumption is rebutted by proof that the miner does not have pneumoconiosis (section 727.203(b)(4)) or any related disability (section 727.203(b)(3)), it was rebutted in

[3] The Consolidation Coal Company has announced its intention to petition for certiorari as well.

[4] DOL black lung claims are adjudicated in accordance with the procedures for adversary litigation contained in the Longshore Act, 33 U.S.C. §§ 901-950, *incorporated in part by reference into* 30 U.S.C. § 932(a). *See Pittston Coal Group*, 109 S. Ct. at 424. SSA's black lung claims are adjudicated in accordance with the adjudicatory provisions of the Social Security Act, 42 U.S.C. §§ 404-408, *incorporated in part by reference into* 30 U.S.C. § 923(b).

this case. The Benefits Review Board affirmed. (App. 17a-19a.)

In reliance on its prior decision in *Broyles* and this Court's decision in *Pittston Coal Group*, the Fourth Circuit reversed and remanded. The court held that since the SSA presumption could not be rebutted even if the miner did not suffer from black lung disease or if the miner's total disability was unrelated to mining exposure, DOL's rebuttal rules were more restrictive than SSA's and thus not valid.[5] The court's conclusions are based exclusively on the reasoning that the DOL rule has extra rebuttal provisions not in the SSA rule. The court notes its disagreement with the contrary holding of the Sixth Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). Chief Judge Ervin dissented stating:

> It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

Clinchfield Coal, 895 F.2d at 184 (Ervin, C.J., dissenting). Petitions for rehearing filed by the Government and Clinchfield were denied. (App. 1a.)

[5] Specifically, the court below held that rebuttal would never be permissible on the grounds that the miner did not have black lung disease. 895 F.2d at 183. The court also invalidated the "disability causation" prong of the DOL rule (section 727.203(b)(3)), but remanded for review under SSA's rule at 20 C.F.R. § 410.416, believing, apparently, that the DOL rule and SSA rule were roughly equivalent in this regard. The Fourth Circuit is, however, clearly wrong in drawing this equivalency. Labor's (b)(3) provision addresses the cause of a miner's total disability. SSA's section 410.416 addresses the cause of the miner's disease. The two matters are wholly independent elements, and the practical effect of the Fourth Circuit's disposition is simply to prohibit the defense from rebutting on the basis of proof that the miner is not disabled in any part due to coal mine employment related lung disease. 895 F.2d at 179 n.1. Shortly after its decision here, the Fourth Circuit recognized that its approach to (b)(3) rebuttal made no sense. *Robinette v. Director, Office of Workers' Compensation Programs*, No. 88-1144 (4th Cir. Apr. 27, 1990) (unpublished). The remands in this case and in *Dayton v. Consolidation Coal Company* are clearly pointless, and the Fourth Circuit so noted in *Robinette*, slip op. at 8 n.9.

REASONS FOR GRANTING THE WRIT

The continuing inability of the courts of appeals to agree on the meaning and validity of the Department of Labor's interim presumption has been intolerable for the industries that must pay the cost of approved black lung benefit claims. Equally intolerable is the premise, embraced by both the Fourth and Seventh Circuits, that in black lung claims our legal system has no interest in the truth. Thousands of claims have lingered in litigation for a decade or longer as the courts, the agency and the private parties try to extract reason and guidance from an ambiguous and contradictory statute, a tangled maze of SSA and DOL regulations and the elusive congressional compromises that produced it all.

This Court now has before it four petitions for certiorari[6] each urging a final reconciliation of the diverse views of the courts of appeals. Each case presents a different theory and approach, and each produces different consequences. A *final* resolution is required and Clinchfield respectfully urges this Court to grant certiorari here and to consolidate all of the cases so that these matters may be finished.

[6] In addition to this case, petitions have been filed in *Peabody Coal Co. v. Hubert Taylor*, No. 89-1696, *Pauley v. Bethenergy Mines Inc.*, No. 89-1714, and *Consolidation Coal Co. v. Dayton*, No. 90-_____.

I.
THE CIRCUITS DISAGREE

It is not necessary to burden the Court with a lengthy discussion of the circuit conflicts. They are clear. In this case, the Fourth Circuit invalidated 20 C.F.R. § 727.203(b)(3), (4) on the grounds that these regulations violate 30 U.S.C. § 902(f)(2). The twist in John Taylor's case is that here the presumption was invoked by blood gas tests, a method of invocation not available under SSA's rule. *Compare* 20 C.F.R. § 727.203(a)(3) *with* 20 C.F.R. § 410.490(b). The Fourth Circuit felt that the method of invocation did not matter. 895 F.2d at 182. ("[W]e should say that we think it is a matter of indifference under which set of regulations the presumption arises . . . .") The Fourth Circuit's holding is, in effect, that the SSA rebuttal rules simply apply in DOL's claims, except to the extent that DOL's rules may be more favorable to the claimant — in which case a mix and match approach is proper. The Fourth Circuit duly noted its disagreement with the decisions of the Third and Sixth Circuits. *Id.* at 183-84 & n.2.[7]

The Seventh Circuit also struck down DOL's rebuttal rules, but in a somewhat different way. *Hubert Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-

[7] The second case espousing the view of the court below is *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990). There, the claimant invoked the presumption on ventilatory study evidence and rebuttal was proven under DOL rebuttal section 727.203(b)(2) and (b)(4) because the miner was not disabled by anything and also did not have pneumoconiosis. The fact that SSA's section 410.490(c)(2) rule bears considerable resemblance to DOL's (b)(2) rule was of no consequence to the court. 895 F.2d at 175. The decision in *Dayton* defies reason and goes far beyond any agency rules. The determination of the Fourth Circuit to prohibit mine operators from defending black lung claims on any basis is remarkable and it is a central reason why the consolidation of the Fourth Circuit cases with those already before the Court is essential.

1696). Focusing on language in the DOL rule requiring the consideration of all relevant medical evidence, the Seventh Circuit held that the absence of similar language in SSA's rule implied a breach of the restrictivity prohibition in 30 U.S.C. § 902(f)(2). 892 F.2d at 506-07. The Seventh Circuit noted its disagreement with the Sixth Circuit. *Id.* at 506.

The Third Circuit and the Sixth Circuit sustained the validity of DOL's rebuttal rules post-*Pittston Coal Group. Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). The Sixth Circuit held that medical evidence is properly considered under DOL's rebuttal rules and that these rules are valid. *Milliken*, 866 F.2d at 202 & n.3.

The Third Circuit's decision is focused more narrowly on DOL rebuttal section 727.203(b)(3). Noting an absence of decisional law under SSA's rule, the Third Circuit held that the regulatory cross-references in SSA's rebuttal section 410.490(c) would have no meaning unless SSA intended to permit rebuttal on the basis of proof that the miner's disability did not arise at least in part from coal dust related lung disease. 890 F.2d at 1302. DOL's rule was, thus, simply more explicit but not more restrictive, and accordingly, did not violate the restrictivity prohibition of 30 U.S.C. § 902(f)(2). *Id.* The Third Circuit noted the conflict between the Sixth and Seventh Circuits. *Id.* at 1303.

II.
THE DECISION BELOW IS CLEARLY WRONG

A. The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988), cannot accommodate an interpretation requiring the payment of employer funded benefits to a miner who has no black lung disease or related disability. The Act's sole purpose

is the establishment of a federal workers' compensation program to provide benefits to coal miners and their families on account of total disability or death due to black lung disease. 30 U.S.C. § 901(a). It is true that Congress liberalized the Act in 1972[8] and 1978[9] to make it easier for claimants to obtain an award. It is also true, as this Court has observed, that in 1978 Congress established a temporary period during which DOL's black lung eligibility criteria would not be more restrictive than SSA's 1972 criteria to maximize the number of claims that would be paid. *See Pittston Coal Group*, 109 S. Ct. at 421.

To accomplish these objectives, Congress generally cast the burden of persuasion on ultimate facts on claim defendants, and enacted other presumptions and rules of proof allocating the risk of uncertainty to the Government or the mine owner. There is, however, no indication in the statute or elsewhere that Congress had the hidden purpose of transforming the Act into a retirement, general disability or life insurance program for coal miners. At all times, the Act retained the critical provisions mandating a connection between disability or death and black lung disease as a predicate to the imposition of liability.

In authorizing the Secretary of Labor to write eligibility regulations, the Act plainly states that those regulations must be designed to compensate total disability due to pneumoconiosis.[10] 30 U.S.C. § 902(f)(1)(A), (D). Certainly, 30 U.S.C. § 902(f)(2) does not expressly amend this basic premise and

---

[8] *See* The Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).

[9] *See* The Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), and the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).

[10] Pneumoconiosis is defined by the Act to mean "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

its reference to SSA "criteria" should be construed in accordance with the premise.

Section 422(c) of the Act also provides: "[N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator . . . ." 30 U.S.C. § 932(c); *see id.* § 932(h). The Fourth Circuit's opinion cannot possibly square with section 422(c). Section 423 of the Act obligates a mine operator to purchase insurance providing compensation for total disability or death due only to pneumoconiosis, not something else. 30 U.S.C. § 933(a); *see also id.* § 932(a). If the Fourth Circuit is correct, the insuring arrangements entered into could prove worthless and are surely inadequate. Section 421 of the Act obligates the Secretary of Labor to approve state workers' compensation programs, providing adequate benefits for total disability or death due to pneumoconiosis, and to release mine operators in an approved state from compliance with the federal Act. 30 U.S.C. § 931. No state workers' compensation program even arguably could comply with the program envisioned by the Fourth Circuit. Section 413(b) of the Act obligates a trier of fact to consider the significance of all relevant medical evidence, specifically mentioning the types of evidence relevant to determining whether the miner is totally disabled or died due to pneumoconiosis. 30 U.S.C. § 923(b). Under the Fourth Circuit's approach, the provision must be amended to mean that the only evidence that is relevant is evidence favoring an award. Evidence tending to defeat a non-meritorious claim is irrelevant.

In *Pittston Coal Group*, this Court reallocated burdens of proof in certain claims. Nothing in the decision purports to change the basic purpose of the Act. The Fourth Circuit's extension of *Pittston Coal Group* here overrides the limits of this statute. This Court has observed, "'in expounding a statute, we [are] not . . . guided by a single sentence or member

of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The words "not more restrictive criteria" do not stand alone in the Act. As a part of the whole they must be construed to have some logical connection with the whole. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). The Fourth Circuit's interpretation of these words, without a doubt, severs them from the whole and it is patently in error for this reason.[11]

B. DOL's rebuttal regulations are not more restrictive than SSA's. This is a matter of absolute certainty if, as here, eligibility is based on blood gas studies. SSA's presumption cannot be invoked by blood gas studies. *Compare* 20 C.F.R. § 410.490(b) *with* 20 C.F.R. § 727.203(a)(3). SSA's regulations establish a separate rule for the evaluation of blood gases, under which the claimant must prove the existence of pneumoconiosis *and* the existence of qualifying blood gas values. 20 C.F.R. Part 410, Subpart D Appendix. If both facts are proven, there is a rebuttable presumption of total disability due to pneumoconiosis "in the absence of evidence rebutting such finding." *Id.* Under SSA's rule, John Taylor could not have qualified for a blood gas presumption because he does not have pneumoconiosis. DOL's rule is clearly less restrictive than SSA's in this setting.

The Fourth Circuit has, however, adopted a "collage rule" for interpreting the word "criteria" in 30 U.S.C. § 902(f)(2). Under this collage rule, the adjudicator mixes and matches DOL and SSA criteria to see if an award of benefits can be produced. Since the statutory baseline is SSA's "criteria" and not a collage, the Fourth Circuit's approach has no statutory foundation.

[11] There is no legislative material validating the Fourth Circuit's approach.

The Fourth Circuit's conclusion that DOL's rebuttal criteria are generally more restrictive than SSA's also fails on a plain language analysis. In *Pittston Coal Group*, DOL's "ten-year" invocation rule was struck down because SSA's interim presumption cross-referenced other portions of SSA's eligibility regulations making it clear that SSA did not impose an invariable ten-year rule in cases presenting x-ray, biopsy or autopsy proof of pneumoconiosis. 109 S. Ct. at 418. SSA's rebuttal rules also contain cross-references to the same set of regulations. 20 C.F.R. § 410.412(a)(1), *incorporated by reference into* 20 C.F.R. § 410.490(c)(1), (2). These cross-references were ignored by the court below, but they are significant.

Section 410.490(c)(2) contains a definition without substantive criteria.[12] The specific criteria are found by following the cross-references first to 20 C.F.R. § 410.412(a)(1) which in turn cross-references 20 C.F.R. §§ 410.424-.426. Section 410.412 defines "total disability" to mean total disability "due to pneumoconiosis." Section 410.426(a), which is incorporated into section 410.412(a)(1), further provides: "A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered."

If the SSA interim presumption rebuttal rule is read in concert with the segments that are incorporated by reference, it is apparent that the SSA presumption may be rebutted by proof that the miner's disability was not "primarily" related to coal dust exposure or that the miner did not have pneumoconiosis. DOL's equivalent rebuttal provisions are within the text of DOL's interim presumption. SSA's "criteria" are discovered by following the internal references. DOL's rules

[12] At the time section 410.490(c) was promulgated by SSA, the term "total disability" was defined in section 402(f), 86 Stat. 153 (1972). This was later amended by the current 30 U.S.C. § 902(f)(1)(A).

clarify SSA's tangled rules, but DOL's rules are not more restrictive.[13]

C. The Fourth Circuit's approach presents a significant due process question. It is not reasonable to construe 30 U.S.C. § 902(f)(2) to mean that a miner with abnormal blood gas studies or ventilatory studies meeting DOL's tables is totally disabled due to pneumoconiosis as a matter of law. Neither method of scientific testing is capable of diagnosing black lung disease, and in the case of DOL's published ventilatory study tables, the listed invocation values are normal for older miners. Abnormal blood gas results may suggest a host of illnesses, or simply reflect the altitude of the testing location or the personal habits of the patient.[14] There is, in fact, little or no connection in common experience between DOL's qualifying invocation values on ventilatory or blood gas tests, and total disability or death due to pneumoconiosis.

It is one thing to permit a burden of proof shift if qualifying invocation values are established, but an entirely different matter to accord preclusive effect to presumed facts by prohibiting rebuttal. The result that flows inevitably from the decision below is that the vital link justifying an imposition of liability on the mine owner is assigned to irrelevancy. John Taylor does not suffer from black lung disease, yet the Fourth Circuit reads 30 U.S.C. § 902(f)(2) to require Clinchfield to pay benefits to Taylor on account of a totally disabling manifestation of a disease he does not have.

This Court observed, "But if a miner is not actually suffering from the type of ailment with which Congress was

---

[13] At a minimum, the setting presented is not nearly clear enough to deny deference to DOL's regulatory interpretation of its mandate. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864-66 (1984).

[14] *See* A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease*, 4-5, 162, 176, 186-87, 376-78 (1978); *see also Pittston Coal Group*, 109 S. Ct. at 421; *id.* at 432-33 (Stevens, J., dissenting).

concerned, there is no justification for presuming that the miner is entitled to benefits." *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 157-59 & n.30 (1987). "Lurking beneath the surface of this case is the constitutional concern that there must be 'some rational connection between the fact proved and the ultimate fact presumed.' " *Id.* at 159 n.32. (Citation omitted.)

The validity of evidentiary devices under the Due Process Clause depends " 'on the strength of the connection between the particular basic and elemental facts and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.' " *Id.* at 158 n.30 (quoting *County Court v. Allen*, 442 U.S. 140, 156 (1979)). The court below mandates the payment of black lung benefits to a miner who does not have black lung disease. This miner produced invocation values on his tests solely because he is obese and smoked cigarettes. In no sense is Clinchfield responsible. However narrow the sweep of the Due Process Clause in an economic rights setting, Congress may not, we submit, require the transfer of money from one private party to another where the liability imposed is entirely disconnected from reality. *See Crowell v. Benson*, 285 U.S. 22, 55-56 (1932) (stating that "there is no ground for an assertion that the [employer] could constitutionally be subjected . . . to the liability which the statute creates" unless the employee's injury arose out of the employment relationship).

III.
THE PRINCIPLES INVOLVED ARE IMPORTANT

There are, at a minimum, several thousand black lung claims that will ultimately turn on the resolution of this matter. The amount at stake for the coal industry is in the neighborhood of $1 billion. Since the program envisioned by the Fourth Circuit is not in any sense a true workers' compensation program, but more closely analogous to general disability insurance, unemployment compensation or life insurance,

the benefits that would be due under such a program were never funded as a part of black lung insuring arrangements.

To the extent that benefits of this sort are funded by employers through other public programs or collectively bargained arrangements, the Fourth Circuit's decision very simply means that the employers will pay twice. There is no offsetting method available unless duplicate benefits were paid under a state workers' compensation law. *See* 30 U.S.C. § 932(g). Congress wrote a program to compensate total disability or death due to occupationally related black lung disease. The decision below departs substantially from that purpose and is in error.

CONCLUSION

This petition for a writ of certiorari should be granted. To ensure the final resolution of the important matters presented, this case should be consolidated with Nos. 89-1696, 89-1714 *and Consolidation Coal Co. v. Dayton* so that the thousands of remaining claims originally filed ten or more years ago can finally be brought to closure.

Respectfully submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
Arter & Hadden
Suite 400
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 775-7154

Counsel for Petitioner

90-113

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND JOHN A. TAYLOR,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
Arter & Hadden
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 775-7154
Counsel for Petitioners

TABLE OF CONTENTS

DOCUMENT	PAGE
Order of the United States Court of Appeals for the Fourth Circuit Denying Petitions for Rehearing in *Taylor v. Clinchfield Coal Company*	1a
Order of the United States Court of Appeals for the Fourth Circuit Granting the Clinchfield Coal Company's Motion for Extension of Time to File Petition for Rehearing With Suggestion for Rehearing En Banc in *Taylor v. Clinchfield Coal Company*	2a
Order of the United States Court of Appeals for the Fourth Circuit Granting the U.S. Department of Labor's Motion for Extension of Time to File Petition for Rehearing and Suggestion for Rehearing En Banc in *Taylor v. Clinchfield Coal Company*	3a
Opinion of the United States Court of Appeals for the Fourth Circuit in *Taylor v. Clinchfield Coal Company*	4a
Decision and Order of the United States Department of Labor Benefits Review Board in *Taylor v. Clinchfield Coal Company*	17a
Decision and Order — Rejection of Claim of the United States Department of Labor Administrative Law Judge in *Taylor v. Clinchfield Coal Company*	20a
U.S. Const. amend. V	33a
30 U.S.C. § 901(a)	34a
30 U.S.C. § 902(f)	35a
30 U.S.C. § 923(b)	37a
30 U.S.C. § 932(c)	39a
20 C.F.R. § 410.490	40a
20 C.F.R. § 727.203	43a

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

April 20, 1990

JOHN A. TAYLOR,

Petitioner-Appellant,

versus

CLINCHFIELD COAL CO.; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Respondents-Appellees.

ORDER

There having been no request for a poll of the court on the petitions for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petitions of the Director and Clinchfield for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of the opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions of the Director and Clinchfield for rehearing shall be, and they hereby are, denied.

With the concurrence of Judge Wilkins, Judge Ervin dissents, he would grant the petitions for rehearing for the reasons stated in his dissenting opinion.

/s/ H. E. Widener, Jr.

For the Court

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

February 20, 1990

JOHN A. TAYLOR

Petitioner

versus

CLINCHFIELD COAL CO., ET AL

Respondents

ORDER

Upon consideration of the Clinchfield Coal Company's motion for enlargement of time to file petitions for rehearing and suggestion for rehearing in banc,

IT IS ORDERED that the parties are granted until March 16, 1990 within which to file their petitions for rehearing with suggestion for rehearing in banc. If at any time prior to the expiration of the time period as extended any party determines not to seek rehearing, they shall immediately notify the Court in writing of this determination.

For the Court — By Direction

/s/ John M. Greacen

CLERK

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

February 15, 1990

JOHN A. TAYLOR

Petitioner

versus

CLINCHFIELD COAL CO., ET AL

Respondents

ORDER

Upon consideration of the Director's motion for extension of time to file petition for rehearing and suggestion for rehearing in banc,

IT IS ORDERED that the motion is granted and the Director is granted an extension of time until March 16, 1990 within which to file a petition for rehearing and suggestion for rehearing in banc. If at any time prior to the expiration of the time period as extended the Director determines not to seek rehearing, the Director shall immediately notify the Court in writing of this determination.

For the Court — By Direction

/s/ John M. Greacen

CLERK

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 87-3852

JOHN A. TAYLOR,

Petitioner,

versus

CLINCHFIELD COAL CO.; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Review of an Order of
the Benefits Review Board.

Argued: April 14, 1989 Decided: February 5, 1990

Before ERVIN, *Chief Judge*,
and
WIDENER and WILKINS, *Circuit Judges*.

Sherry Lee Wilson (CLIENT CENTERED LEGAL SERVICES OF SOUTHWEST VIRGINIA, INC., on brief) for Appellant. Michael Francis Blair (PENN, STUART, ESKRIDGE & JONES, on brief) for Appellees.

WIDENER, Circuit Judge:

John A. Taylor seeks review of the decision of the Benefits Review Board affirming the denial of his claim for disability benefits pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1986). The Board upheld the determination of the Administrative Law Judge that Clinchfield Coal

Company had successfully rebutted claimant's presumption of total disability due to pneumoconiosis. On appeal, Taylor argues that application of the interim Labor Department regulation rebuttal provisions, 20 C.F.R. § 727.203(b)(3) and (4), to find rebuttal of his claim, violates 30 U.S.C. § 902(f). We agree with that argument and remand the case for further consideration under the interim Health, Education and Welfare regulation rebuttal provisions found in 20 C.F.R. § 410.490(c).

Taylor applied for Black Lung benefits on November 5, 1976. Initially, the benefits were awarded. Clinchfield Coal Company was named the responsible operator having been Taylor's final employer for a period of more than one year. Clinchfield filed a controversion.

A hearing was held on December 14, 1983, before an Administrative Law Judge who denied the claim on October 26, 1984, having evaluated the claim under the interim Labor Department regulations, 20 C.F.R. § 727.203. The ALJ invoked the interim presumption provided for in § 727.203(a)(3), finding that Taylor satisfied the 10-year requirement of coal mine employment and was totally disabled by pneumoconiosis based on qualifying arterial blood gas studies. However, the ALJ went further and found the presumption rebutted pursuant to § 727.203(b)(3) and (4). He concluded that the physicians' opinions in the record supported his finding of rebuttal that Taylor did not have pneumoconiosis under § 727.203(b)(4) and was "not totally disabled from this disease" under § 727.203(b)(3).[1] The Board affirmed the ALJ's decision on May 14, 1987. This appeal followed.

---

[1] In this case, the ALJ determined that the evidence established that Taylor does not have pneumoconiosis, nor was he totally disabled from the disease. From that finding, the ALJ concluded that the presumption was rebutted under § 727.203(b)(3) and (4).

(footnote continues)

Taylor is 55 years old. The record shows that he worked about 12 years in coal mines, his most recent employment being with Clinchfield ending in 1972. Taylor smoked approximately one pack of cigarettes a day for 30 years. He is also 20 pounds overweight for his height.

The medical evidence includes six X-rays between 1971 and 1983. The first reading, from an X-ray taken on June 6, 1971, noted some P-type nodules, but was insufficient to establish pneumoconiosis under the regulations. The next film, taken September 3, 1976, was read showing P and S-type opacities with a profusion of 1/1, which qualifies as a positive reading under the regulations. A January 17, 1977 X-ray was read by Dr. Navani, a B-reader, as consistent with pneumoconiosis. An X-ray dated August 26, 1981, done as part of a physical examination requested by Clinchfield, was read as negative five different times. An X-ray dated February 16, 1983, was read by claimant's physician as positive for the disease, P/Q 1/1; however, Clinchfield's readers found that film negative on three different readings. The last X-ray is dated November 3, 1983, and was read negative twice by Clinchfield's readers. Further, none of the four pulmonary function studies in the record qualifies claimant under the regulations.

As noted, the ALJ invoked the interim presumption on the basis of Taylor's arterial blood gas studies. Of the 7 blood gas studies performed, one in 1976, three in 1981, and three in 1983, the latter three were obviously qualifying under the regulations and the ALJ properly invoked the presumption.

(footnote continued)

Rebuttal under § 727.203(b)(3), however, is accomplished by showing that claimant's total disability "did not arise in whole or in part out of coal mine employment." So, the conclusion drawn by the ALJ from his findings of fact will not support a finding of rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law.

Taylor has seen several physicians, including one at the request of the Department of Labor and two at the request of Clinchfield. His treating physicians, Dr. Kanwal and Dr. Smiddy, diagnosed pneumoconiosis in February of 1983. Chronic bronchitis was the diagnosis of Dr. Tholpady who examined claimant in 1977 at the request of the Department. Dr. Garzon and Dr. Dahhan, who both examined the claimant at the request of Clinchfield, attributed his pulmonary impairment to his cigarette smoking. Also at the request of Clinchfield, Dr. Kress, a non-examining, non-treating physician, reviewed the medical records. His conclusion was that the claimant suffered from chronic bronchitis secondary to his cigarette smoking and obesity. Drs. Kanwal, Smiddy, and Garzon stated in their opinions that claimant's pulmonary impairment was of sufficient severity to preclude him from coal mine work or other comparable employment.

Claimant argues that application of the rebuttal provisions of the interim Labor regulations found under 20 C.F.R. § 703.203(b) violates 30 U.S.C. § 902(f)(2). Under § 902(f)(2), "[c]riteria to be applied by the Secretary of Labor in the case of . . . any claim . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." At this point, we think the history of the dual system of application of the regulations bears repeating. It is described in the case of *Broyles v. Director, OWCP*, 824 F.2d 327, 328-329 (4th Cir. 1987), which was consolidated with *Sebben* and affirmed in the recent Supreme Court decision of *Pittston Coal Group v. Sebben*, 57 U.S.L.W. 4029 (December 6, 1988).

> A miner is entitled to disability benefits under the Black Lung Benefits Act if he is totally disabled by pneumoconiosis arising out of his coal mine employment. See 30 U.S.C. §§ 901(a) and 902(b) (1986). Congress and the various agencies responsible for administering the benefits program have recognized that the existence and causes of pneumoconiosis are difficult to determine, and have over the years established a number of evidentiary presumptions to

assist miners in proving their claims. Regulations creating presumptions to establish the elements of a claim for benefits have been promulgated in accordance with the legislative mandate to give the benefit of the doubt to claimants. *Southard v. Director, OWCP*, 732 F2d 66, 71 (6th Cir. 1984). Congress has repeatedly amended the acts to ensure the liberal award of benefits and to rectify what it perceived as a persistent administrative practice of undue strictness in the award of benefits. *Director v. Bethlehem Mines Corp.*, 669 F2d 187, 190 (4th Cir. 1982).

The "interim presumption" at 20 C.F.R. § 410.490 was promulgated by the Secretary of Health, Education and Welfare in response to the Congressional directive that he loosen the eligibility requirements for benefits and facilitate prompt processing of claims. *Tally v. Matthews*, 550 F2d 911, 916 (4th Cir. 1977). When promulgated, however, 20 C.F.R. § 410.490 by its terms applied only to claims filed by living miners before July 1, 1973 or by their survivors before July 1, 1974. 20 C.F.R. § 410.490(b).

The interim presumption available under 20 C.F.R. § 410.490 is clearly the least restrictive presumption which has ever been available to a black lung claimant. This interim presumption can be established through an x-ray read as showing pneumoconiosis and a showing that the disability arose out of coal mine employment. The only way to rebut this presumption is to show that the claimant is either doing or capable of doing his usual coal mine work. 20 C.F.R. § 410.490. This regulation provides a standard which is easily met. A somewhat similar interim presumption is provided under 20 C.F.R. § 727.203, however, it requires that the miner in question have ten years of coal mine employment.

In contrast, all claims filed after January 1, 1974, see 30 U.S.C. § 931 (1986), were initially adjudicated under more restrictive criteria. These claims were administered by the Secretary of Labor. Initially, no regulations were promulgated to govern the entitlement benefits. Instead, the Secretary of Labor adjudicated these claims under the "permanent" [HEW] regulations located at 20 C.F.R. §§ 410.401-410.476.

Thus, the Secretary of Labor was adjudicating claims only under the more restrictive permanent regulations at the same time the Secretary of Health, Education and Welfare was applying the far more lenient interim presumption available at 20 C.F.R. § 410.490 to claims filed before the magic date of July 1, 1973. Congress, perceiving the inequity, enacted the 1978 amendments to the Act in an effort to make the proof of claims more uniform. *Director v. Bethlehem Mines Corp.*, 669 F2d at 190.

The 1978 amendments added 30 U.S.C. § 902(f)(1)(B), which directed the Secretary of Labor to create new "permanent" criteria governing eligibility requirements. Most significantly for the purposes of this appeal, the 1978 amendments provided at 30 U.S.C. § 902(f)(2):

> Criteria to be applied by the Secretary of Labor in the case of —
>
> * * * * *
>
> (C) any claim filed on or before the effective date of [the new, "permanent"] regulations promulgated under this subsection [*i.e.*, under 30 U.S.C. § 902(F)(1)(D)] by the Secretary of Labor . . .

> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

Mr. Broyles initially filed his claim on September 17, 1976. Mr. Colley filed his claim on September 18, 1974. The Secretary of Labor did not effectively promulgate the new "permanent" regulations, located at 20 C.F.R. Part 718, until April 1, 1980. In each appellant's case, the ALJ found that because the claimant did not satisfy the requirement that he have been employed in the coal mines for at least 10 years, he was not entitled to the interim presumption available at 20 C.F.R. § 727.203 and his claims had to be evaluated under the more restrictive regulations found at 20 C.F.R. §§ 410.401-410.476. The appellants argue that the interim presumption available under § 410.490 should have applied to their claims.

> In light of Congress' clear mandate in 30 U.S.C.A. 902(f) we agree with appellants' position and reverse and remand the decision of the BRB. It is difficult to imagine that Congress picked the date of June 30, 1973, the last day under which the interim presumption would be available under 20 C.F.R. § 410.490, out of a hat. It is far more likely that Congress intended that the liberal interim presumption available under 20 C.F.R. § 410.490 be applied to all claims filed before such time while the Secretary of Labor promulgated the new "permanent" regulations at 20 C.F.R. Part 718.

In *Sebben*, the Supreme Court upheld the Fourth Circuit decision that since the interim criteria, including 10 years' coal mining employment, needed to invoke the presumption of entitlement applied by the Secretary of Labor in 20 C.F.R.

§ 727.203 are more restrictive than those found in the HEW regulations at 20 C.F.R. § 410.490, the application of § 727.203 instead of the less restrictive § 410.490 violated 30 U.S.C. § 902(f)(2). The Court remanded the claims for consideration of invocation under the less restrictive § 410.490.

The Court stated in its opinion that the decision only applied to the affirmative factors for invoking the presumption of entitlement, not to the rebuttal factors, because the respondents in that case conceded the validity of certain rebuttal provisions, thus not requiring the Court to decide the question. 57 U.S.L.W. at 4032, 4033. The issue raised by claimant here is the rebuttal question reserved in *Sebben*. He urges that the rebuttal provisions under the interim Labor Department regulations are more restrictive than those under the interim HEW regulations. Thus, although the presumption was invoked under § 727.203(a), he argues that he should receive the benefit of the less restrictive rebuttal provisions of § 410.490(c).

At this point, we should say that we think it is a matter of indifference under which set of regulations the presumption arises because for a miner who has 10 years' coal mine employment, regardless of the reason for establishing the presumption, it is precisely the same. Indeed, an examination of the two regulations involved reveals that, except for two or three words, each presumption is the same as the other, *in haec verba*. In §§ 410.490(b) and 410.416, the presumption is phrased that such miner "will be presumed to be totally disabled due to pneumoconiosis" and that "the pneumoconiosis arose out of such [coal mine] employment." The presumption established under § 727.203(a) is that the miner "will be presumed to be totally disabled due to pneumoconiosis . . . arising out of that [coal mine] employment." So we do not accept any argument that the rebuttal provisions must be pegged to the invocation provisions. It is the fact of establishment of the presumption and the substance thereof which is

of consequence in this case, not the number of the regulation which provides for such establishment.

Section 410.490(c) allows for two methods of rebuttal after invocation of the presumption, which we paraphrase:

> (c)(1) Evidence that the miner is performing his usual coal mining or comparable work, or
>
> (c)(2) Evidence, including physical performance tests, that miner is capable of performing his usual coal mining or comparable work.

The interim Labor Department regulations, while containing the two provisions above, add two additional methods of rebuttal under § 727.203(b), which are quoted:

> (b)(3) The evidence establishes that the total disability . . . of the miner did not arise in whole or in part out of coal mine employment; or
>
> (b)(4) The evidence establishes that the miner does not . . . have pneumoconiosis.

Thus, the interim Labor Department regulations permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability.

The rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements of statutory

entitlement may be rebutted, the provisions are more restrictive than those found in § 410.490 and their application violates 30 U.S.C. § 902(f).[2]

In this case, as mentioned, the ALJ determined that claimant's presumption was rebutted by evidence which established the rebuttal provided for by § 727.203(b)(3) and (4).[3] However, had the rebuttal aspect of Taylor's claim been considered under the less restrictive provisions of § 410.490(c), the establishment of rebuttal because of the elements mentioned in § 727.203(b)(3) and (4) would not have been considered. The respondents argue that *Sebben* has no application to the case at hand as the claimants in that case had fewer than 10 years of coal mine employment. Although that is a factual distinction, the *Sebben* decision is not so narrowly fact specific. The relevant issue in *Sebben* is the interpretation of 30 U.S.C. § 902(f)(2) in respect to the difference in application of the interim Labor Department regulations by the Secretary of Labor and the interim HEW regulations by the same Secretary. The Court gave § 902(f)(2) a literal application in *Sebben*, and we see no reason to question a similar application here.

In the text of this opinion, we have, sometimes with some specificity, indicated the difference between the rebuttal provisions of § 410.490(c) and § 727.203(b). Those parts of the opinion were written with the literal wording of the regulations in mind, as well as the reasoning of *Broyles* that the "only way to rebut this presumption [under § 410.490] is to show that the claimant is either doing or capable of doing his

---

[2] We realize that our decision is inconsistent with that of *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989) which refused to extend that circuit's precedent to the rebuttal provisions. *Milliken* held that, although, following *Sebben*, the invocation of the presumption would be controlled by § 410.490, the rebuttal would be governed by Part 727 provisions, even though they were more restrictive. A result with which, with respect, we do not agree.

[3] As to § 727.203(b)(3) rebuttal, see n.1, supra.

usual coal mine work."[4] In affirming *Broyles*, however, the Court in *Sebben*, 57 U.S.L.W. at 4031, held that there are three elements necessary for a successful claim under the black lung statutes. They are: (1) pneumoconiosis, which was (2) caused by coal mine employment, and (3) resulting total disability. The Court pointed out at 57 U.S.L.W. at 4030 that the presumption of causation arising because of 10 years' coal mine employment and found in § 410.416 was subject to rebuttal. That rebuttal provision is similar to that described in § 727.203 (b)(3). So the rebuttal provisions of § 410.490(c), together with § 410.416 and § 727.203(b), have three points of similarity, as applicable in this case, in view of the *Sebben* decision, instead of only two as the face of §§ 727.203(b) and 410.490(c) would indicate. That also, of course, would have to qualify our opinions in *Broyles*, at 824 F.2d at 329, that the "only" way to rebut the presumption under § 410.490 is by evidence with respect to total disability. Nevertheless, that leaves § 727.203(b)(4) rebuttal, on the basis that the miner does not have pneumoconiosis, as an additional and restrictive provision not found in the interim HEW regulations in § 410.490(c). So, applying the more restrictive regulation in rebuttal is a violation of 30 U.S.C. § 902(f).

We remand the claim to the Board for further remand to an ALJ to determine if the evidence in the case meets the

[4] Accord *Couch v. Secretary, HEW*, 774 F.2d 163, 166 (6th Cir. 1985); *Vinston v. Califano*, 592 F.2d 1353, 1356 n.3 (5th Cir. 1979).

rebuttal provisions under § 410.490(c) or the rebuttal provisions as to causality of § 410.416 if the miner claims under § 410.416.[5]

PETITION GRANTED AND
REMANDED WITH INSTRUCTIONS.[6]

ERVIN, Chief Judge, dissenting:

I respectfully dissent.

As pointed out in footnote 2, my brethren concede that their holding is inconsistent with the decision of the Sixth Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). More recently, the Third Circuit has come down on the side on the Sixth in *Bethenergy Mines Inc. v. Director, OWCP and Pauley*, ____F.2d ____, No. 89-3364 (3d Cir. Dec. 7, 1989). Although the rationale employed by these two courts differ somewhat, I am more comfortable with the results they have reached than the one suggested by the majority here and by the Seventh Circuit in *Taylor v. Peabody Coal Co.*, ____F.2d ____, No. 86-2590 (7th Cir. Aug. 28, 1989). It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and

[5] The ALJ states in conclusory fashion in his opinion that as the claim did not meet Part 727, he also reviewed it and found that it did not satisfy the requirements of Part 410. The ALJ's decision was filed before the Supreme Court decision in *Sebben*; therefore, we may safely assume that the ALJ was referring to Part 410.401 *et seq.* In all events, it is the decision of the Board that we review, not the decision of the ALJ. The decision of the Board did not mention, consider, or rely on Part 410, so under *S.E.C. v. Chenery*, 318 U.S. 80 (1943), that is not a part of the administrative decision subject to review.

[6] While it may be arguable that the erroneous finding of the ALJ, affirmed by the Board, that there was rebuttal under § 727.102(b)(3) would constitute a trial of that issue and the subject not be again open for further consideration, that is not the case here. The administrative decision applied the wrong standard, and although consideration of the rebuttal of the presumption under § 410.416 as construed in *Sebben* deals with the same subject, causation, as § 727.203(b)(3), we think the claimant can have no complaint if the evidence in the case is considered on remand under the proper standard.

confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

For the reasons articulated by our sister circuits in *Milliken* and *Bethenergy*, I would affirm the denial of benefits to Taylor.

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036
BRB No. 84-2444 BLA
OWCP No. 401-40-9901

JOHN A. TAYLOR
Claimant-Petitioner

v.

CLINCHFIELD COAL COMPANY
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

} DECISION and ORDER

NOT - PUBLISHED
May 14, 1987

Appeal of the Decision and Order-Rejection of Claimant of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

J. Thadieu Harris, III (Wolfe & Farmer), Norton, Virginia, for claimant.

Ellen Joyce-Barry (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before: BROWN and DOLDER, Administrative Appeals Judges and CLARKE, Administrative Law Judge.*

---

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-3019) issued by Administrative Law Judge Joel R. Williams denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act).

Based on 11.75 years of coal mine employment and qualifying blood gas studies, the administrative law judge found that claimant had established invocation of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. § 727.203(a)(3). The administrative law judge further found that the Employer had established rebuttal of this presumption pursuant to 20 C.F.R. §§ 727.203(b)(3) and (b)(4), and consequently denied benefits. On appeal, claimant challenges the administrative law judge's finding that the evidence establishes rebuttal. Employer argues in favor of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that it was error for the administrative law judge to weigh non-qualifying ventilatory studies and non-qualifying x-rays in considering whether rebuttal has been established, citing, *Hampton v. Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982) and *Whicker v. Benefits Review Board*, 733 F.2d 346 (4th Cir. 1984).

In determining whether rebuttal of the interim presumption has been established, the administrative law judge considered all the relevant evidence, including non-qualifying x-rays and test results and medical opinions. 20 C.F.R. § 727.203(b). This is consistent with the recently issued decision, *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424,

8 BLR 2-109 (4th Cir. 1986) (*en banc*). Claimant's contention, therefore, that the administrative law judge should consider on rebuttal only those objective studies with positive results and the medical opinions based on such studies is without merit.

Accordingly, the Decision and Order-Rejection of Claim is affirmed.

SO ORDERED.

/s/ James F. Brown

JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nancy S. Dolder

NANCY S. DOLDER
Administrative Appeals
Judge

/s/ David A. Clarke, Jr.

DAVID A. CLARKE, JR.
Administrative Law Judge

Dated this 14th
day of May 1987

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of JOHN A. TAYLOR Claimant v. CLINCHFIELD COAL COMPANY Employer and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party-in-Interest	Date Issued: 26 Oct 1984 CASE NO. 81-BLA-3019 OWCP NO. 401-40-9901

J. Thadieu Harris, III, Esq.
Wolfe & Farmer
For the Claimant

Ellen Joyce Barry, Esq.
Penn, Stuart, Eskridge & Jones
For the Employer

Before: JOEL R. WILLIAMS
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901, *et seq.* In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs on July 1, 1981, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Benefits are also awardable to the survivors of persons whose death was caused by pneumoconiosis, and, for claims filed prior to January 1, 1982, to the survivors of persons who were totally disabled from pneumoconiosis at the time of their deaths. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Abingdon, Virginia, on December 14, 1983, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code of Federal Regulations.

The record was left open after the hearing to permit the deposing of Dr. G.S. Kanwal by counsel for the defendant. (Tr.7)[1] This deposition has been submitted and is admitted into evidence as Employer's Exhibit 18.

Issues

The specific issues presented for resolution are:

1) Whether Claimant is a miner as defined by the Act and regulations;

2) Whether the Claimant worked at least ten years in qualifying coal mining employment;

---

[1] The following abbreviations will be used when citing to the record in this matter:

DX — Director's Exhibit
CX — Claimant's Exhibit
EX — Employer's Exhibit
TR — Transcript of the hearing.

3) Whether the Claimant has pneumoconiosis as defined by the Act and regulations;

4) Whether Claimant's pneumoconiosis arose out of coal mine employment;

5) Whether the Claimant is totally disabled;

6) Whether the Claimant's disability is due to pneumoconiosis;

7) Whether Claimant can do comparable and gainful work;

8) Whether Defendant is liable for any benefits assessed by reason of the Claimant's marital status as defined by the Act and regulations; and

9) Whether the statutes and regulations under which this claim is being prosecuted are unconstitutionally discriminatory and arbitrary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coal Miner

The claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. A miner for purposes of § 725.202 ". . . is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works in or around a coal mine or coal preparation facility." (20 C.F.R. 725.202). Claimant states that he was a coal loader for 18 months in 1947-'49. (Tr.13,15) The employment as a coal loader required that Claimant push the cart that had been loaded with coal within the mine. (Tr.14) Claimant testified that he worked an abandoned mine with his father from the fall of 1956 to 1962. (Tr.32) At that time Claimant states that he was required to ". . . lay up the track, set the timbers, drill the holes, shoot it, load it in the car and bring it to the outside and dump it." (Tr.17) Claimant states

that he worked as a roof bolter, coal loader and a dust machine helper for Lambert Coal Company from 12/1/62 through 12/31/63. (Tr.19; DX2; DX4) Claimant states that he worked for Clinchfield Coal Company as primarily a roof bolter within the mine from 1969 through 1972. (Tr.20; DX5) Given the above uncontradicted description by Claimant of his employment in the mine for all periods spent as a coal mine employee, I find that Claimant is a person who has worked in and around a coal mine in the extraction of coal and in coal mine construction and maintenance.

Length of Coal Mine Employment

Neither the Act nor the Regulations contain guidelines for computing the length of coal mine employment. The Benefits Review Board has held that such computations should be based on some reasonable method with the result supported by substantial evidence in the record considered as a whole. *Wilkerson v. Georgia Pacific Corp.*, 1 BLR 1-830 (1978). Further, where there is no documentary evidence available, the Administrative Law Judge may reply on the Claimant's uncontradicted testimony. *Gibert v. Williamson Coal Company, Inc.*, 3 BLR 3-67, 79 BLA 358 (April 22, 1981). Claimant's testimony as to employment in 1947 through 1948 for an eighteen month period and in 1956 through 1962 is not supported by social security records or employer records. The Claimant was able to relate these periods of work to the period of his military service which is shown in the 1971 records by Southwestern State Hospital (DX19) as being from 1949 to 1956. I find his testimony to be creditable in this regard.

Claimant has statements from Lambert Coal Company and Clinchfield Coal Company verifying coal mine employment from 12/1/62-12/31/63 and 6/17/69-8/23/72 respectively. (DX4,5) Therefore, relying on Claimant's uncontradicted testimony, and employer statements, I find

the Claimant has sustained the burden of proof in establishing 11¾ years of coal mining employment. *Renie v. U.S. Steel Corp.*, 1 BLR1-859 (1978).

Date of Filing

The Claimant filed his claim for benefits under the Act on November 5, 1976. The claim is timely filed.

Responsible Operator

The Clinchfield Coal Company is the last employer for whom the miner worked for a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case under Subpart F of Part 725 of the regulations. (DX1,2,5)

Dependents

The Claimant has one dependent for purposes of augmentation of benefits under the Act, namely, his wife, Lucille A. Taylor.

Pneumoconiosis and Total Disability

In order to be eligible for benefits, claimant must prove that he is totally disabled due to pneumoconiosis arising out of his coal mine employment. Under § 727.203 of the regulations (the interim presumption), a claimant with ten or more years of coal mine employment will be presumed to be totally disabled due to pneumoconiosis arising out of that employment if one of four medical criteria is met. Since claimant has more than ten years of qualifying coal mine employment, the evidence must be evaluated to determine if he meets the medical criteria set out in § 727.203(a)(1)-(4) of the regulations.

The presumption may be invoked under subsection (a)(3) if blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values specified therein.

In order to meet the subsection (a)(3) standards, if the arterial $_pC02$ is 39, the arterial $_p02$ must be equal to or less than 61 mm.Hg. If the $_pC02$ is 38, the arterial $_p02$ must be equal to or less than 62 mm. Hg. If the $_pC02$ is 35, the arterial $_p02$ must be equal to or less than 65 mm. Hg. If the $_pC02$ is 34, the arterial $_p02$ must be equal to or less than 66 mm. Hg. If the $_pC02$ is 31, the $_p02$ must be equal to or less than 69 mm. Hg.

All conflicting blood gas studies must be weighed prior to invocation of the presumption under subsection (a)(3). (*Stiner v. Bethlehem Mines Corporation*, 3 BLR 1-487 (BRB, 1981) (Supra)). As pneumoconiosis is a progressive and irreversible disease, greater weight may be given to the most recent evidence (*Call v. Director, OWCP*, 2 BLR 1-146 (BRB, 1979)). Either an at rest or exercise blood gas level may be used to invoke the presumption as long as the administrative law judge explains why one test is chosen over another. (*Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972 (BRB, 1980)).

A blood gas study performed on 9/3/76 produced a $_pC02$ of 38.2 and a $_p02$ of 81.7 before exercise. (DX12)

A blood gas study done on 2/20/81 produced a $_pC02$ of 35.0 and a $_pC2$ of 72.3 before exercise. (EX5)

A blood gas study done on 2/26/81 produced a $_pC02$ of 33.6 and a $_p02$ of 68.2 before exercise. (EX6)

A blood gas study done on 8/26/81 produced a $_pC02$ of 32 and a $_p02$ of 66 before exercise and a $_pC02$ of 31 and a $_p02$ of 68 after exercise. (EX1)

A blood gas study done on 1/10/83 produced a $_pC02$ of 38.5 and a $_p02$ of 72.7 before exercise. (EX7)

A blood gas study done on 2/16/83 produced a $_pC02$ of 37.8 and a $_p02$ of 53.7 before exercise. (CX1)

A blood gas study done on 11/3/83 produced a $_pC02$ of 34.3 and a $_p02$ of 59.3 before exercise and a $_pC02$ of 30.6 and $_p02$ of 71.2 after exercise. (EX12)

The latest three blood gas studies done on 1/10/83, 2/16/83 and 11/3/83 are qualifying studies under the regulations except for the after exercise results of the 11/3/83 test. The before exercise results of the 11/3/83 test are in accord with two previous and recent tests. The etiology of the Claimant's hypoxemia[2] is of no concern in determining whether the presumption has been raised under subsection (a)(3). Rather, it is a matter to be considered in rebuttal. I conclude that the presumption has been invoked.

The presumption which arises under § 727.203(a) may be rebutted by one of the four methods set forth in § 727.203(b). All relevant medical evidence must be considered on rebuttal.

The presumption may be rebutted under subsection (b)(3) if it is established that the miner's disability did not arise in whole or in part out of his coal mine employment.

Subsection (b)(3) is for consideration where it is alleged that a proven, totally disabling respiratory impairment is caused by a condition other than one arising out of coal mine employment (*Van Nest v. Consolidation Coal Company*, 3 BLR 1-526 (BRB, 1981)).

In *Blevins v. Peabody Coal Co.*, BRB No. 81-2085 BLA (1983) the Board held that evidence purporting to establish causation due to smoking must meet the "four prong test" given in *Blevins v. Peabody Coal Co.*, 1 BLR 1-1023 (1979). The "four prong test" requires the medical expert to

> (1) explain whether it is possible to distinguish between pulmonary disability caused by smoking and that caused by coal dust exposure with any degree of medical certainty;

---

[2] There is general agreement by the physician's who have rendered opinions in this case that the blood gas studies do demonstrate hypoxemia although of varying degrees.

> (2) explain whether there are sufficient facts to permit a distinction to be made in a particular case;
>
> (3) state his opinion as to the origin of claimant's pulmonary disability;
>
> (4) explain how the evidence of record supports his conclusion. (*Blevins*, (1979) p.1029)

The presumption can also be rebutted under subsection (b)(4) by establishing that the miner does not have pneumoconiosis.

Citing *Ansel v. Weinberger* 529 F2d 304 (6th Cir. 1976) and *United States Steel Corporation v. Gray*, 588 F2d 1022 (5th Cir. 1979), the Benefits Review Board held in (*Murphy v. Consolidation Coal Company*, 3 BLR 1-575 (1981)) that evidence consisting solely of radiologists' interpretations of X-rays as negative for existence of pneumoconiosis is insufficient to rebut the presumption under subsection (b)(4). But other medical opinion, based only in part on negative chest X-rays or based on evidence other than negative chest X-rays may suffice to make this showing.

The record contains fourteen readings of six different X-rays, of which three are positive and eleven are negative for pneumoconiosis. Only one of the positive readings is by a "B" reader though the other two positive readings were done by Board Certified Radiologists. Also two of the positive readings were done in 1976 and 1977. Three separate X-rays taken 8/26/81, 2/16/83 and 11/3/83 with eleven readings are all negative except for a positive reading of 2/16/83 by Larry H. Westerfield, M.D. Giving more weight to the "B" reading and the latest X-rays, I find that the presumption is not raised under subsection (a)(1) by the X-ray evidence.

None of the five pulmonary function studies of record produced values which would have qualified for the presumption under §727.203(a)(2).

The record includes the report of S.S. Tholpady, who evaluated the miner on behalf of the Department of Labor on January 17, 1977. (DX11) The doctor took the miner's work and health histories and performed a physical examination. A chest X-ray and pulmonary function study was also done in connection with his examination.

G.S. Kanwal, M.D., has treated the Claimant from February 1981 until present. His reports and deposition are of record. (EX18)

Contained in the record is the report of A. Dahhan, M.D., who evaluated the miner on behalf of Employer on August 26, 1981, took the miner's work and health histories and performed a physical examination. Associated with the report were the results of a chest X-ray, a pulmonary function study and a blood gas study.

Also included in the record is the report of J.F. Smiddy, M.D., who evaluated the miner on behalf of Claimant on February 16, 1983. (CX1) Dr. Smiddy took the miner's work and health histories and performed a physical examination. He also had the results of a chest X-ray, a pulmonary function study and a blood gas study done on February 16, 1983. (CX1)

A medical report has been submitted by F.L. Garzon, M.D., who evaluated the miner on behalf of Employer on November 3, 1983. (EX12) Dr. Garzon took the miner's work and health histories and performed a physical examination. He also had the results of a chest X-ray, a pulmonary function study and a blood gas study done on November 3, 1983.

Substantially all of the evidence identified above has been reviewed on behalf of the employer by G.O. Kress, M.D. He also reread the three most recent X-rays. His analysis and opinion is included in the record. (EX13)

Dr. Tholpady diagnosed the Claimant's cardiorespiratory condition as chronic bronchitis and opined that it was

unrelated to dust exposure in the patient's coal mine employment.

In his report of February 15, 1983, Dr. Kanwal noted that the Claimant had a "marked degree of lung disease" but he did not offer any differential diagnosis. In his deposition, he stated that the Claimant had chronic bronchitis. He opined that smoking would be the number 1 cause of this disease. Dr. Kanwal stated further that although exposure to coal dust, as such, does not cause chronic bronchitis, exposure to coal mine gas could.[3] He further testified that he had also entered a diagnosis of pneumoconiosis in his notes on the Claimant's first visit. However, he acknowledged that this was done without any recorded history concerning the nature of the Claimant's coal mine work and without the benefit of any X-rays, pulmonary function studies or blood gas tests.

Dr. Dahhan diagnosed Claimant's condition as " . . . chronic bronchitis due to his excessive smoking habits with no evidence of occupational pneumoconiosis." (EX1) He based his opinion on pulmonary function findings, physical exam, records provided and an arterial blood gas study. (EX8 pg.12,13). Specifically, Dr. Dahhan states that "[t]he thirty-pack years would be consistent with causing areas of ventilation perfusion mismatch that would result in the blood gas picture that was demonstrated." (EX pg.12,13)

Dr. Smiddy concluded as follows:

> This patient has sufficient coal workers pneumoconiosis to produce a severe respiratory impairment documented by all the objective evidence at hand but in particular documented by the severe arterial hypoxemia which is present and this patient's health would be sufficiently impaired to preclude the type of physical activity required for underground coal mine employment. A portion of this patients lung

[3] The Claimant has testified that he had not been exposed to gases of any kind. (T.26)

disease is certainly chronic obstructive pulmonary disease secondary to prior cigarette smoking.[4]

Dr Garzon diagnosed Claimant's condition as chronic bronchitis, early pulmonary emphysema, exogenous obesity, anxiety neurosis and depression based on a physical examination, X-ray, pulmonary and blood gas studies. (EX12)

Dr. Kress diagnosed Claimant's condition as chronic bronchitis. (EX13) Specifically, he states

> (c)hronic bronchitis can produce abnormal blood gas studies by causing a ventilation perfusion mismatch . . . . Again, then I believe this man's *demonstrable hypoxemia is secondary to first his obesity and secondly his chronic bronchitis.* As to the *etiology of his chronic bronchitis I think it is without question secondary to his years of cigarette smoking.* It is, of course, recognized that individual(s) with excessive dust exposure may develop what is known as environmental or industrial bronchitis. Removal of these individuals from dust exposure will result in clearing of this type of bronchitis within six months or so. This man has been away from his occupational dust exposure for perhaps as much as 11 years but, indeed, has continued his habit of cigarette usage. I think quite clearly then that his on going productive cough which is diagnostic of chronic bronchitis is related to his smoking history and not to his coal mine employment . . . .
>
> In an individual with a perfectly normal vital capacity, indeed, at times above predicted normal, with a normal diffusing capacity which has been demonstrated on two occasions, I do not believe that

[4] The cigarette smoking history recorded by Dr. Smiddy was 1/2 pack per day for 30 years. The Claimant reported to other examiners that he smoked a full pack per day until about 1981.

> he has any impairment that could be possibly attributed to coal workers' pneumoconiosis. (EX13 p.6)

From the foregoing opinions, I conclude that the Employer has established by the preponderance of the evidence that the Claimant does not have pneumoconiosis[5] and that he is not totally disabled from this disease. Accordingly, the presumption is rebutted under both subsections (b)(3) and (b)(4).

As the claim can not be allowed under Part 727, I have also reviewed it under Part 410. Based on the foregoing evidence, I am unable to make the requisite finding that the Claimant is totally disabled as the primary result of pneumoconiosis.

It follows from my findings and conclusions that the Claimant is not entitled to benefits under the Act.

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of John Taylor for benefits under the Act is denied.

/s/ Joel R. Williams

JOEL R. WILLIAMS
Administrative Law Judge

[5] Defined as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (§ 727.202).

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C., 20036. (20 CFR 725.481)

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

30 U.S.C. § 901(a)

§ 901. Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 923(b)

§ 923. Filing of notice of claim

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act [42 U.S.C.A. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in

support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. §§ 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408], shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

30 U.S.C. § 932(c)

§ 932. Failure to meet workmen's compensation requirements

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such

miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as

the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli

to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

(3)

No. 90-113

Supreme Court, U.S.
FILED
SEP 17 1990
SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act of 1972, which requires the Department to apply "[c]riteria * * * not [illegible] more restrictive" than criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bethenergy Mines, Inc. v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending, No. 89-1714	5, 6
Broyles v. *Director, OWCP*, 824 F.2d 327 (4th Cir. 1987), aff'd *sub nom. Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988)	4
Dayton v. *Clinchfield Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114	5
Krahel v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990)	6
Pittston Coal Group v. *Sebben*, 109 S. Ct. 414 (1988)	2, 4
Robinette v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), petition for cert. pending, No. 90-172	6
Youghiogheny & Ohio Coal Co. v. *Milliken*, 866 F.2d 195 (6th Cir. 1989)	4

Statutes and regulations:

Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*	2
§ 402(f)(2), 30 U.S.C. 902(f)(2)	2, 4, 5
20 C.F.R.:	
Section 410.490	2
Section 410.490(b)(1)	2
Section 410.490(c)(1)	2
Section 410.490(c)(2)	2

Statutes and regulations—Continued: Page

Section 727.203 2
Section 727.203(a)(1)-(5) 2
Section 727.203(b)(3) 3
Section 727.203(b)(4) 3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-113

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 895 F.2d 178. The decision and order of the Benefits Review Board (Pet. App. 17a-19a) and the decision and order of the administrative law judge (Pet. App. 20a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. The order denying the petition for rehearing was entered on April 20, 1990 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108-111 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption has been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work, or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1976, after 12 years of coal mining, John Taylor applied for black lung benefits. Pet. App. 5a, 24a. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) initially found him eligible for benefits, but Clinchfield Coal Company, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. *Id.* at 5a. The ALJ found that Taylor had properly invoked the presumption of eligibility for benefits based on his 12 years of coal mining and on blood gas tests showing an impairment in the transfer of oxygen from his lungs to his blood. *Id.* at 6a, 24a-26a.

The ALJ also concluded, however, that Clinchfield Coal had rebutted the presumption under Labor's third and fourth rebuttal methods by proving that Taylor was not totally disabled from coal mining and, indeed, did not have pneumoconiosis. Pet. App. 31a. The ALJ relied on negative x-ray evidence, non-qualifying ventilatory test scores, and medical reports that he found more persuasive than conflicting x-ray readings and medical reports. That evidence supported the conclusion that Taylor suffered from chronic bronchitis caused by obesity and 30 years of cigarette smoking rather than from pneumoconiosis. *Id.* at 27a-31a. Accordingly, the ALJ denied benefits. *Id.* at 31a.

The Benefits Review Board affirmed, concluding that the ALJ's decision was supported by substantial evidence. Pet. App. 18a-19a.

3. The court of appeals reversed. Pet. App. 4a-16a. It first dismissed the argument that Labor's regulation cannot be considered "more restrictive" than HEW's regulation as applied to Taylor because (a) he invoked the presumption based on blood gas studies, a method of invocation available under Labor's regulation but not HEW's, and (b) the ALJ concluded that Taylor could *not* invoke the presumption under HEW's regulation on the basis of his x-rays and ventilatory test scores. Pet. App. 11a, 27a. The court thought it "a matter of indifference" how the claimant invoked the presumption of eligibility and therefore did not accept "any argument that the rebuttal provisions [of Labor's regulation] must be pegged to the invocation provisions." *Id.* at 11a.

Relying largely on its decision in *Broyles* v. *Director, OWCP*, 824 F.2d 327 (4th Cir. 1987), aff'd *sub nom. Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), the court determined that Labor's third and fourth rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability." Pet. App. 12a. The court then concluded that these additional methods violate Section 402(f)(2), a result the court acknowledged to be "inconsistent" with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). Pet. App. 12a-13a & n.2.

Having invalidated Labor's rebuttal methods, the court then qualified its opinion by reading HEW's regulation as allowing a rebuttal method "similar" to Labor's third method, which authorizes rebuttal by proof that the claimant's disability was not caused by coal mine employment. Pet. App. 14a. The court

remanded the case for further consideration of that issue. *Id.* at 14a-15a.

Chief Judge Ervin dissented. Pet. App. 15a-16a. He agreed with the majority that its decision conflicted with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken* and also noted a conflict with the Third Circuit's decision in *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (1989), petition for cert. pending, No. 89-1714 (filed May 7, 1990). In his view, the approach of the Sixth and Third Circuits did "less violence to congressional intent, and avoid[ed] both upsetting the statutory scheme and raising due process problems." Pet. App. 16a.

ARGUMENT

We agree with petitioner that the court of appeals erred. The black lung program provides benefits to coal miners who are totally disabled due to pneumoconiosis, and neither HEW nor the Department of Labor intended that its regulations would authorize benefits where, as here, the claimant does not have pneumoconiosis. Nor was that Congress's intent in establishing the program or in enacting Section 402(f)(2). Moreover, there is an express conflict in the circuits as to the validity of Labor's third and fourth rebuttal methods, and the conflict may affect as many as 3,500 pending cases. For the reasons discussed more fully in our brief in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714, we agree with petitioner that review by this Court is warranted.[1]

---

[1] We are serving a copy of our brief and of our supplemental brief in *Pauley* on the other parties in this case. We are also serving a copy of our brief in No. 90-114, *Consolidation Coal Co.* v. *Dayton*, on the other parties.

However, review of the decision in this case will not necessarily resolve the conflict. As petitioner states (Pet. 8), the "twist" in this case is that the presumption was invoked by blood gas studies, a method not available under HEW's regulation, and Taylor could not invoke the presumption under the methods available under HEW's regulation. Pet. App. 27a. Thus, under HEW's regulation, Taylor would not be entitled to benefits. Since Taylor's claim fails under both regulations, we believe that Labor's regulation cannot be considered more restrictive than HEW's with respect to his claim. In other words, we think the court of appeals erred by concluding (Pet. App. 11a) that it is a "matter of indifference" how the presumption was invoked. If the Court were to agree with that conclusion—on what would logically be the first issue to be considered—then it would not reach the issue on which the courts of appeals are divided: whether the additional rebuttal methods in Labor's regulation may be employed when a claimant invokes the presumption in a manner consistent with HEW's regulation.[2] Accordingly, we recommend that the Court hold this case for disposition in light of No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, or No. 90-114, *Consolidation Coal Co.* v. *Dayton*, since review by this Court of either of those cases should resolve the conflict in the circuits.

[2] The fact that this case is in an interlocutory posture also weighs against review, although not heavily in our view. The Fourth Circuit recently retreated from the suggestion in this case that HEW's regulation provided a method of rebuttal similar to Labor's third method. In an unpublished decision, the court concluded that this suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending, No. 90-172 (filed July 25, 1990). See also *Krahel* v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished), slip op. 5-6 ("we have recently held that application of the rebuttal provisions of 20 C.F.R. § 727.203(b)(3) and (4) violates 30 U.S.C. § 902(f)"). Under that view, all that the Board would need to do on remand would be to enter an order awarding benefits.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petitions in No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, and No. 90-114, *Consolidation Coal Co.* v. *Dayton*.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

SEPTEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282203 20120

ORIGINAL

Supreme Court, U.S.
FILED
SEP 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

OCT 26 PAGE

No. 90-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND JOHN A. TAYLOR,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Martin D. Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
(703) 762-5501

Counsel for Respondent

No. 90-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY, *
*
Petitioner, *
*
v. *
*
DIRECTOR, OFFICE OF WORKERS' *
COMPENSATION PROGRAMS, UNITED *
STATES DEPARTMENT OF LABOR AND *
JOHN A. TAYLOR, *
*
Respondents. *
*
****

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, John Taylor moves the Court for an order permitting him to proceed in this court, in forma pauperis, pursuant to the provisions of Title 28 United States Code, Section 1915 and Rule 46 of the Rules of this court and in support thereof attaches his affidavit. Mr. Taylor was allowed to proceed in forma pauperis before the United States Court of Appeals for the Fourth Circuit.

JOHN A. TAYLOR
-By Counsel-

Martin D. Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
(703) 762-5501
Counsel for Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, John A. Taylor, being first duly sworn, depose and say that I am the respondent in the above styled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I was granted leave to proceed in forma pauperis in the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this matter are true:

(1) Are you now employed? yes____ no_X__ self employed?____

(a) Name and address of employer_____

(b) If YES, How much do you earn per month? _____

(c) If NO, Give month and year of last employment __1972___

(d) How much did you earn per month? __$800.00 per month__

(2) If married, is your spouse employed? Yes____ No N/A

(a) If YES, How much does your spouse earn per month? _____

(b) If a minor child under age 21, what is your parents' or guardians' approximate monthly income? ___ _____

(3) Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments or other income? Yes_X_ No___

(a) If YES, give the amount received and identify the sources.

Received	Source
$510.00	Soc. Sec. Disability Benefits
_____	_____
_____	_____

(4) Have you any cash on hand or money in checking or savings accounts? Yes____ No X

(a) If YES, Give total amount._____

(5) Do you own any real estate, stocks, bonds, notes, automobiles, or other property (excluding ordinary household furnishings and clothing)? Yes____ No____

(a) If YES, Give value and decription

Value	Description
$4,200	House, 4 room - wood frame
$ 700	1980 Ford
$ 500	1979 Chevrolet Pickup Truck

(6) What is your marital status?

Single___ Married___ Widowed___ Separated___ Divorced X

(a) Total number of dependents. Self

(b) List the people you actually support and your relationship to them.

_____

_____

(7) What are your debts and monthly bills? List all creditors, including banks, loan companies, charge accounts, etc.

Creditor/Monthly bill	Monthly payment	Total bill
Burial Insurance	$ 18.30	_____
Rent or mortgage	_____	_____
House Insurance	$ 30.00	$360/yr.
Automobile Insurance	$ 50.00	$600/yr.
Electricity	$ 50.00	_____
Gas-cooking	$ 10.00	_____
Heat	_____	$500/yr.
Water	$ 37.75	_____
Telephone	_____	_____
Food	$ 200.00	_____
Clothing	$ 20.00	_____
Laundry & Cleaning	$ 25.00	_____
Medical	$ 40.00	_____
Transportation	$ 30.00	_____
Furniture Payment	$ 50.00	$300+
TOTAL	$ 561.05	

I do not pay all my bills every month.

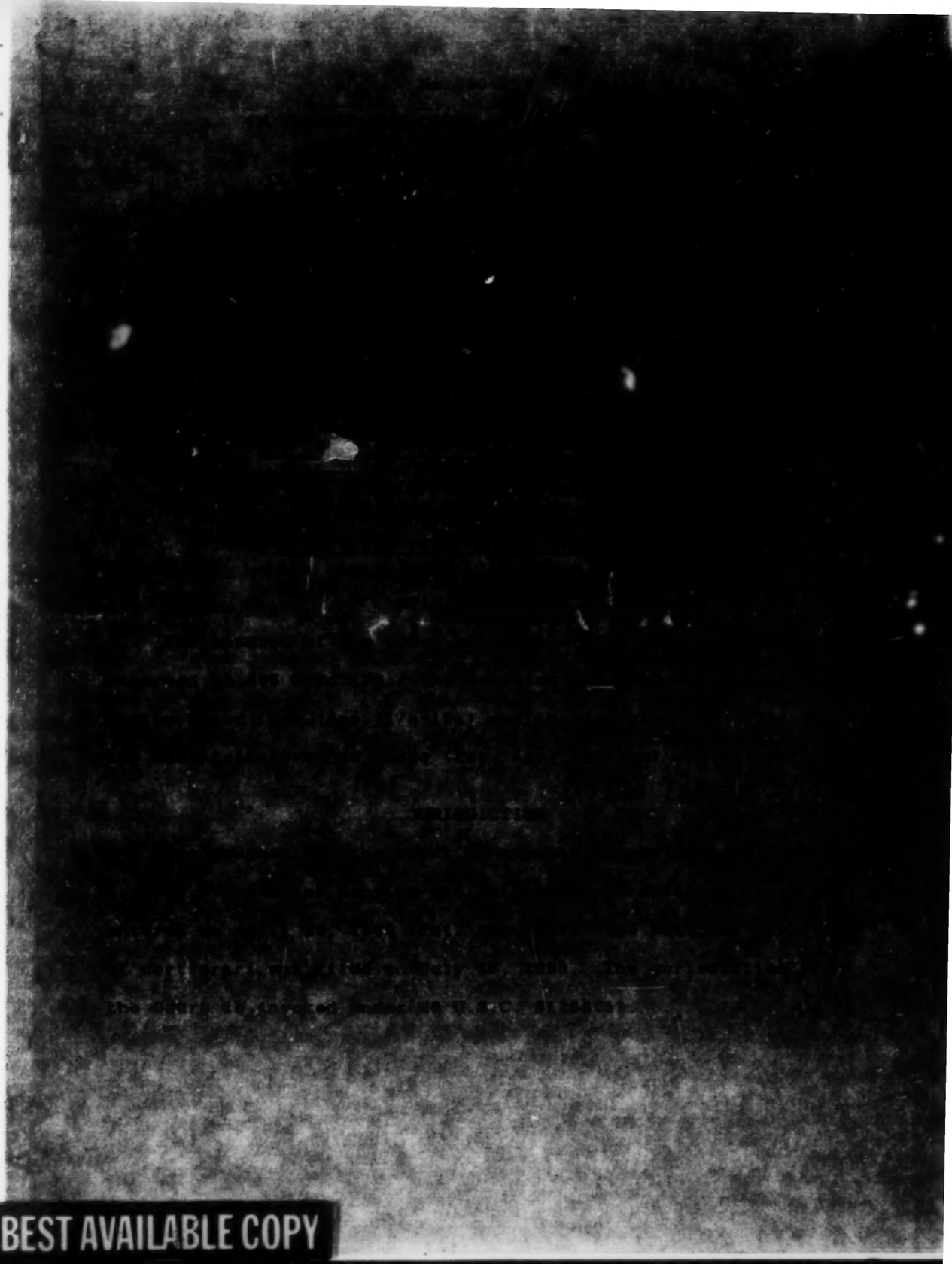
I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

John A. Taylor

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 15th DAY OF August, 1990.

Notary Public

My Commission expires: 10-16-92.



BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the two additional rebuttal methods found in the Department of Labor interim regulations, 20 C.F.R. §727.203(b), violate Congress' mandate in Section 402(f)(2) of the Black Lung Benefits Act of 1972 that the Department of Labor regulations not be more restrictive than the Department of Health, Education and Welfare (HEW) Social Security interim regulations, 20 C.F.R. §410.490, applicable to claims filed on or before June 30, 1973.

2. Whether the directive of Congress that the Department of Labor interim regulations not be more restrictive than the HEW interim regulations is permissible under the due process clause of the Constitution.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Page

I. CASES

American Construction Co. v. Jacksonville T. & K.W.R. Co., 148 U.S. 372 (1893).....5

Bethenergy Mines. Inc. v. Director, OWCP and Pauley, 890 F.2d 1295 (3rd Cir. 1989), petition for cert. pending No. 89-1714 (filed May 7, 1990).....4,7

Krahel v. Consolidation Coal Co., No. 89-2394 (4th Cir. Apr. 5, 1990).....6

Pittson Coal Group v. Sebben, 488 U.S. 105 (1988).....3

Robinette v. Director, OWCP, No. 88-1144 (4th Cir. Apr. 27, 1990), petition for cert. pending No. 90-172 (filed July 25, 1990).....6

Taylor v. Clinchfield Coal Co., 895 F.2d 178 (4th Cir. 1990) petition for cert. pending No. 90-113 (filed July 17, 1990).....6,7

Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989).....4

II. STATUTES AND REGULATIONS

28 U.S.C. §1254(1).....1

30 U.S.C. §901 et. seq.....2

30 U.S.C. §902(f)(2).....2,3,4

20 C.F.R. §410.416.....4

20 C.F.R. §410.490.....2

20 C.F.R. §727.203.....2

20 C.F.R. §727.203(a)(3).....6

20 C.F.R. §727.203(b)(3).....4,5,6

20 C.F.R. §727.203(b)(4).....4,5,6

No. 90-113

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 895 F.2d 178. The decision and order of the Benefits Review Board (Pet. App. 17a-19a) and the decision and order of the administrative law judge (Pet. App. 20a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. The order denying the petition for rehearing was entered on April 20, 1990 (Pet. App. 1a). The petition for writ of certiorari was filed on July 17, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972, 30 U.S.C. §901 et. seq., provides benefits to former coal miners and designated survivors for total disability or death due to their pneumoconiosis. Claims filed prior to June 30, 1973 were decided by the Department of Health, Education, and Welfare (HEW) under regulations which contain 20 C.F.R. §410.490. Pet. App. 40a-42a. Congress amended the Act several times in an effort to increase the approval rate of claims. These amendments transferred responsibility for the Black Lung Program to the Department of Labor. The Secretary of Labor was instructed to promulgate his own regulations with the proviso that with regard to claims filed before the institution of the Department of Labor permanent regulations, these regulations could not be more restrictive than the HEW regulations applied to claims filed before June 30, 1973, 30 U.S.C. §902(f)(2). Pet. App. 36a.

The Secretary of Labor in an effort to comply with this directive issued his interim regulations. These regulations include an interim presumption and rebuttal provisions, 20 C.F.R. §727.203. Pet. App. 43a-45a. This regulation has five categories of medical evidence which may be used to invoke the presumption that a miner with more than ten years of coal mine employment is totally disabled by pneumoconiosis arising out of his coal mine employment. The HEW interim regulation contained two categories of medical evidence and did not require proof of ten years of coal mine employment. Because of the requirement of ten years of coal mine employment the Labor interim presumption

provision was found to violate 30 U.S.C. §902(f)(2). Pittson Coal Group v. Sebben, 488 U.S. 105 (1988).

In addition to the invocation issue addressed in Sebben, the Labor interim regulation also contains more restrictive rebuttal provisions. The HEW interim regulation contained only two methods of rebuttal while the Labor interim regulation has four methods of rebuttal.

2. Mr. Taylor applied for Black Lung Benefits in 1976 after twelve years as a coal miner. Pet. App. 6a, 24a. The deputy commissioner found that he was eligible for benefits and named Clinchfield Coal Company as the responsible operator. Clinchfield contested the claim and requested a hearing before an administrative law judge. Pet. App. 5a. The administrative law judge found that Mr. Taylor had invoked the interim presumption of total disability from pneumoconiosis arising out of his coal mine employment but that Clinchfield had rebutted that presumption by showing that Mr. Taylor was not totally disabled from pneumoconiosis[1] and that he did not suffer from

---

[1] As the court of appeals correctly noted in a footnote to its opinion, the administrative law judge applied an incorrect standard to his finding of (b)(3) rebuttal; and therefore, this finding is not supported by substantial evidence:

> In this case, the ALJ determined that the evidence established that Taylor does not have pneumoconiosis, nor was he totally disabled from the disease. From that finding, the ALJ concluded that the presumption was rebutted under § 727.203(b)(3) and (4).
>
> Rebuttal under § 727.203(b)(3), however, is accomplished by showing that claimant's total disability "did not arise in whole or in part out of coal mine employment." So, the conclusion drawn by the ALJ from his findings of fact will not support a

pneumoconiosis. Pet. App. 5a, 31a. So, the administrative law judge denied the claim. Pet. App. 31a. The Benefits Review Board affirmed this decision finding that the denial was supported by substantial evidence. Pet. App. 18a-19a.

3. The court of appeals remanded this case to the Benefits Review Board for further remand to an administrative law judge with instructions to apply the proper standard to the causation issue. Pet. App. 5a, 15a. This case was not reversed. The court of appeals found that the rebuttal provision under 20 C.F.R. §727.203(b)(4) violated 30 U.S.C. §902(f)(2). Pet. App. 13a, 14a. It also noted that the HEW interim regulation on its face did not allow for a causation rebuttal. Pet. App. 13a. The court did note, however, that 20 C.F.R. §410.416 provides for a causation rebuttal therefore it remanded the case for consideration under the proper standard. Pet. App. 14a-15a. In addition, the administrative law judge had not applied the correct standard in finding rebuttal under 20 C.F.R. §727.203(b)(3). Pet. App. 5a-6a.

Chief Judge Ervin dissented.- Pet. App. 15a-16a. He noted that the majority decision was in conflict with both the Sixth Circuit, Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989), and the Third Circuit, Bethenergy Mines, Inc. v. Director, OWCP and Pauley, 890 F.2d 1295 (3rd Cir. 1989). He

---

finding of rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law.

Taylor v. Clinchfield Coal Company, 895 F.2d, 178, 179 (4th Cir. 1990) footnote 1.

concluded that he would affirm the denial of benefits because to do so would avoid potential due process problems. Pet. App. 16a.

ARGUMENT

This court should not grant the petition for writ of certiorari in this case. While it is true that the Circuits are split on the validity of the Department of Labor interim presumption rebuttal provisions, this is not the case with which to resolve this conflict. There are three factors which mitigate against review of this case. First, as noted by the Director in his reply brief, this case is in an interlocutory posture. Second, because this case deals with arterial blood gas studies, it could be disposed of without resolving the issue in cases where the presumption is invoked by ventilatory studies or X-rays. Third, the due process question was not raised by Clinchfield in the court of appeals.

The Court of Appeals for the Fourth Circuit remanded this case for reconsideration of the causation rebuttal finding. While it found that the (b)(4) rebuttal provision was invalid, the finding on (b)(3) is not clear. This case could be resolved by allowing the administrative process to reconsider the evidence in light of the court of appeals decision. Since this case is in an interlocutory posture, this should counsel against review at this time. See, American Construction Co. v. Jacksonville T. & K.W.R. Co., 148 U.S. 372, 384 (1893) (review of interlocutory order inappropriate "unless it is necessary to prevent

extraordinary inconvenience and embarrassment in the conduct of the cause").

While the Director acknowledges this impediment to review by this Court, he offers no reason for deviating from established practice in this case. The Director, in an effort to convince the court that the remand is without effect, cites two cases which the court of appeals decided after this case, Robinette v. Director, OWCP, No. 88-1144 (4th Cir. Apr. 27, 1990), petition for cert. pending, No. 90-172 (filed July 25, 1990), Krahel v. Consolidation Coal Co., No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished). Notwithstanding the court's rejection of both methods of rebuttal in these two cases, the court of appeals did not issue that decision in Taylor. It does not follow that the Benefits Review Board can do nothing on remand but award benefits.

This Court need not resolve the conflict in the Circuits concerning the validity of the (b)(3) and (b)(4) rebuttal methods in all cases to decide this case. Because Mr. Taylor invoked the interim presumption found at 20 C.F.R. §727.203(a)(3) on the basis of qualifying arterial blood gas studies, the opponents to his claim can argue that the rebuttal provisions under the HEW interim regulation may not be applied to his claim.. This is true because the interim HEW presumption could only be invoked by qualifying X-rays or ventilatory studies. If this Court accepted the argument that the rebuttal provisions must be tied to the invocation provisions, it could dispose of this case without ever reaching the issue at the core of the conflict. Only a case, in

which the claimant invoked the presumption on the basis of x-ray evidence, such as Bethenergy Mines, Inc. v. Director, OWCP and Pauley, 890 F.2d 1295 (3rd Cir. 1989), petition for cert. pending No. 89-1714 (filed May 7, 1990), would allow the Court to quickly and expeditiously deal with this issue in all the cases.

Also, Clinchfield did not raise the constitutional issue before the Fourth Circuit; therefore, the court of appeals did not address the question. The due process issue is one that is unlikely to be resolved by the Taylor case.

Clinchfield has asked the Court to take review in this case and three others currently pending before the court and consolidate them for briefing and argument. Petitioner Taylor opposes the motion for consolidation. The Court need not accept all the cases in order to decide the issue. Granting review and consolidating these cases, as urged by the petitioner, would be extremely unmanageable for the Court and unduly burdensome for the parties, involving a multitude of issues and at least nine separate parties with counsel scattered half way across the country.

CONCLUSION

The petition for a writ of certiorari should either be denied, or held and disposed of as appropriate in light of the disposition of Bethenergy Mines, Inc. v. Director, OWCP and Pauley, No. 89-1714.

JOHN A. TAYLOR
-By Counsel-

Martin Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
703-762-5501

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

CLINCHFIELD COAL COMPANY,	*	
	*	
Petitioner,	*	
	*	
v.	*	No. 90-113
	*	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	*	
	*	
and	*	
	*	
JOHN A. TAYLOR,	*	
	*	
Respondents.	*	
	*	

****

CERTIFICATE OF SERVICE

I, Martin Wegbreit, Esquire, a member of the bar of this court do hereby certify that pursuant to Rule 29 of the Rules of this Court that on this 27th day of September, 1990, a copy of the Brief in Opposition Opposition to the Petition for Writ of Certiorari in the above captioned case was served by U.S. mail, postage prepaid, on:

Mark E. Solomons
Arter & Hadden
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202-775-7154

Christopher J. Wright
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530
202-514-2217

by depositing true copies of the same in the United States Post Office, Castlewood, Virginia, with first class postage prepaid.

Martin Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
703-762-5501
Counsel for John A. Taylor

Phone 703/762-5501

P.O. BOX 147

Serving
BUCHANAN COUNTY
DICKENSON COUNTY
LEE COUNTY
CITY OF NORTON
RUSSELL COUNTY
SCOTT COUNTY
TAZEWELL COUNTY
WISE COUNTY

CLIENT CENTERED LEGAL SERVICES
OF SOUTHWEST VIRGINIA, INC.
CASTLEWOOD, VIRGINIA 24224

HUGH F. O'DONNELL, Executive Director
DIANE F. DUBBEAU, Senior Staff Attorney
MARTIN D. WEGBREIT, Senior Staff Attorney
MARGARET T. SCHENCK, Staff Attorney
PAUL G. BEERS, Staff Attorney
SHERRY L. WILSON, Staff Attorney

September 27, 1990

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
1 First Street, N.W.
Washington, D.C. 20543

Re: Clinchfield Coal Co. v. Director, OWCP and John A. Taylor, Petition for a Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit, # 90-113.

Dear Mr. Spaniol:

Enclosed please find the original of the following documents which I wish to file in the above-styled action:

(1) Motion to Proceed In Forma Pauperis, with attached Affidavit,

(2) Brief in Opposition to the Petition for Writ of of Certiorari, with attached Certificate of Service.

Kindly file these with the Court and send your acknowledgement of receipt of them.

Please bring the Motion to Proceed In Forma Pauperis to the attention of the Court for its consideration.

Thanking you for your cooperation and assistance, I am,

Sincerely,

Martin Wegbreit
Senior Staff Attorney

MW/jbv

Enclosures

cc: Mark E. Solomons, Esq.
Christopher J. Wright, Esq.

RECEIVED
OCT - 1 1990

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-1714, 90-113, and 90-114

In the Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

[Additional Litigants Listed on Inside Cover]

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

DAVID L. SHAPIRO
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

CHRISTOPHER J. WRIGHT
Assistant to the
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

QUESTION PRESENTED

Whether persons who do not have black lung disease or are not disabled by it are entitled to benefits under the Black Lung Benefits Act.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Constitutional, statutory, and regulatory provisions involved	3
Statement	3
Summary of argument	15
Argument:	
The "criteria" set out in the rebuttal provisions of the Department of Labor's presumption regulation are not more restrictive than those applicable under the Part B program	19
A. None of the claimants has shown that he would have obtained benefits under the Part B program	20
B. Section 402(f)(2) does not bar a party contesting entitlement from showing that a claimant does not have pneumoconiosis or is not disabled by the disease	25
Conclusion	33
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of America v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380 (1984)	32
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	32
Connolly v. *PBGC*, 475 U.S. 211 (1986)	30
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)	29-30
FCC v. *Schreiber*, 381 U.S. 279 (1965)	25
Mathews v. *Lucas*, 427 U.S. 495 (1976)	31

Cases—Continued: Page

Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 4, 19, 31, 32
PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 30
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 4, 6, 10, 19, 21, 26, 32
Public Citizen v. *United States Dep't of Justice*, 109 S. Ct. 2558 (1989) 29
Railroad Retirement Bd. v. *Alton R.R.*, 295 U.S. 330 (1935) 30-31
Robinette v. *Director, OWCP*, No. 88-1144 (4th Cir. 1990), petition for cert. pending, No. 90-172 14
Rosebud Coal Sales Co. v. *Weigand*, 831 F.2d 926 (10th Cir. 1987) 11
Udall v. *Tallman*, 380 U.S. 1 (1965) 32
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 5, 17-18, 28, 29, 30
Youghiogheny & Ohio Coal Co. v. *Milliken*, 866 F.2d 195 (1989) 14

Constitution, statutes and regulations:

U.S. Const. Amend. V 3, 1a
Due Process Clause 31
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 3
Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* 3
§ 401(a), 30 U.S.C. 901(a) 4, 15, 19
§ 402(b), 30 U.S.C. 902(b) 4, 16, 22
§ 402(f), 30 U.S.C. 902(f) 3
§ 402(f)(2), 30 U.S.C. 902(f)(2) ..... *passim*
§ 411(a), 30 U.S.C. 921(a) 20
§ 411(c), 30 U.S.C. 921(c) 3, 4, 28, 2a-4a
§ 411(c)(1), 30 U.S.C. 921(c)(1) 5, 17, 23, 27
§ 411(c)(2), 30 U.S.C. 921(c)(2) 5, 6
§ 411(c)(3), 30 U.S.C. 921(c)(3) 5, 18, 28
§ 411(c)(4), 30 U.S.C. 921(c)(4) 5,6, 9, 10, 17, 18, 27, 29
§ 411(c)(5), 30 U.S.C. 921(c)(5) 6
§ 413(b), 30 U.S.C. 923(b) 28
§ 415, 30 U.S.C. 925 4

Statutes and regulations—Continued: Page

§§ 421-422, 30 U.S.C. 931-932 4
§ 422(*l*), 30 U.S.C. 932(*l*) 11
Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 ..... 3, 6
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 3
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 3
Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 3
§ 202(b), 95 Stat. 1643 6
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82:
§ 13203(a), 100 Stat. 312 3
§ 13203(d), 100 Stat. 313 3
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 3
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330-446 3
20 C.F.R.:
Section 410.401(b) 4
Section 410.401(b)(1) 23
Section 410.412(a)(1) 7
Section 410.416 ..... 7, 24
Section 410.456 ..... 7, 24
Section 410.490 ..... 3, 6, 12, 5a-8a
Section 410.490(b) 6
Section 410.490(b)(1) 6
Section 410.490(b)(2) 6, 8, 16, 17, 21, 22, 23, 24
Section 410.490(b)(3) 6, 24
Section 410.490(c) 7
Section 410.490(c)(2) 9
Section 410.490(e) 10
Section 718.201 4
Section 725.212 11
Section 727.202 4
Section 727.203 ..... 3, 8, 8a-10a
Section 727.203(a)(1) 8
Section 727.203(a)(2) 26

Regulations—Continued: Page

Section 727.203(b)(1) 9
Section 727.203(b)(2) 9
Section 727.203(b)(3) 9
Section 727.203(a)(3)-(5) 8
Section 727.203(b)(4) 9
Section 727.203(d) 3, 10

Miscellaneous:

Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. (1974) 7

Employment Standards Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979* (1980) 8

43 Fed. Reg. (1978):

p. 17,765 32
p. 17,771 32
p. 36,826 33

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 28, 29

HEW, Coal Miner's Benefits Manual (Supp. 1972) 22, 23, 24

Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677 (1983) 4

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1714

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY, PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

No. 90-113

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

No. 90-114

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

OPINIONS BELOW

The opinion of the Third Circuit in *Pauley* v. *Bethenergy Mines, Inc.* (89-1714 Pet. App. 1-19) is reported at 890 F.2d 1295. The corresponding opinions of the Benefits Review Board (89-1714 Pet. App. 20-22) and the administrative law judge (Pet. App. 23-41) are unreported.

The opinion of the Fourth Circuit in *Clinchfield Coal Co.* v. *Director, OWCP* (90-113 Pet. App. 4a-16a) is reported at 895 F.2d 178. The corresponding opinions of the Benefits Review Board (90-113 Pet. App. 17a-19a) and the administrative law judge (Pet. App. 20a-32a) are unreported.

The opinion of the Fourth Circuit in *Consolidation Coal Co.* v. *Director, OWCP* (90-114 Pet. App. 2-7) is reported at 895 F.2d 173. The corresponding opinions of the Benefits Review Board (90-114 Pet. App. 8-13) and the administrative law judge (Pet. App. 14-27) are unreported.

JURISDICTION

The Third Circuit entered judgment in *Pauley* v. *Bethenergy Mines, Inc.* on December 7, 1989, and denied a petition for rehearing on February 6, 1990. 89-1714 Pet. App. 42-43. The petition for a writ of certiorari was filed on May 7, 1990.

The judgments of the Fourth Circuit in *Clinchfield Coal Co.* v. *Director, OWCP* and *Consolidation Coal Co.* v. *Director, OWCP* were both entered on February 5, 1990, and orders denying petitions for rehearing in both cases were entered on April 20, 1990.

90-113 Pet. App. 1a; 90-114 Pet. App. 1. Petitions for writs of certiorari were filed in both cases on July 17, 1990.

On October 29, 1990, the Court granted the petitions and consolidated the three cases. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) in all three cases.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution; Sections 402(f) and 411(c) of the Black Lung Benefits Act of 1972, 30 U.S.C. 902(f) and 921(c); the Department of Health, Education, and Welfare's presumption regulation, 20 C.F.R. 410.490; and the Department of Labor's presumption regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act,[1] 30 U.S.C. 901 *et seq.*, pro-

---

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150. It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, and the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635. See also the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313, and the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330-446 (both amending trust fund tax provisions).

vides benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment."[2] *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108 (1988), citing *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987); see 30 U.S.C. 901(a). Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under Part B of the Act, which established a federally financed program.[3] Disability claims filed after that date are considered by the Department of Labor (DOL) under Part C of the Act, which established a program financed by the coal industry. *Sebben*, 488 U.S. at 109-110; 30 U.S.C. 925, 931-932.

a. *The Part B Program.* In Section 411(c) of the Act, 30 U.S.C. 921(c), Congress established a number of presumptions to govern the Part B program. The first presumption provides that in the case of a claimant suffering from pneumoconiosis who worked for at least ten years as a coal miner, "there shall be

[2] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust, cotton fibers, or asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment.

[3] The Department of Health, Education, and Welfare is no longer in existence. Its principal functions are now divided between the Department of Health and Human Services and the Department of Education. As indicated in text, however, administrative functions under the Black Lung Benefits Act are now performed by the Department of Labor.

a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). The second provision sets out a similar causation presumption with respect to miners with at least ten years' experience who died from a respiratory disease. 30 U.S.C. 921(c)(2). The third provision establishes an irrebuttable presumption—the only such presumption governing claims adjudication—that miners presenting x-ray, biopsy, or autopsy evidence showing complicated pneumoconiosis are entitled to benefits.[4] 30 U.S.C. 921(c)(3).

The fourth statutory presumption, set out in Section 411(c)(4) of the Act, was added to the Act in 1972. It provides a rebuttable presumption of entitlement to benefits for miners with at least 15 years of coal mine experience who cannot demonstrate complicated pneumoconiosis by means of x-ray, biopsy, or autopsy evidence, but who present "other evidence demonstrat[ing] the existence of a totally disabling respiratory or pulmonary impairment." 30 U.S.C. 921(c)(4). The provision further states that "[t]he Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory

[4] While simple pneumoconiosis is "seldom productive of significant respiratory impairment," complicated pneumoconiosis "usually produces significant pulmonary impairment and marked respiratory disability." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (footnote omitted). In *Turner Elkhorn Mining*, this Court rejected the coal industry's constitutional challenge to the irrebuttable presumption set out in Section 411(c)(3). The Court noted that "it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate," and held that it was not irrational for Congress to conclude that any miner with the advanced stage of the disease should receive benefits. 428 U.S. at 23.

or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Ibid.*[5]

Shortly after enactment of the 1972 amendments that included Section 411(c)(4), the Secretary of HEW promulgated a presumption regulation, 20 C.F.R. 410.490, setting out adjudicatory rules for Part B claims. The regulation was drafted in a most confusing manner. See *Sebben*, 488 U.S. at 109. Subsection (b), which governs invocation of the presumption, has three subparts. Subsection (b)(1) provides that a claimant must present either (i) x-ray, biopsy, or autopsy evidence showing the existence of pneumoconiosis, or (ii) "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment," ventilatory test scores showing the presence of a chronic respiratory or pulmonary disease. Subsection (b)(2) calls for proof that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456)."[6] Subsection (b)(3) provides that "a

[5] The fifth and last presumption set out in Section 411(c) provides that certain survivors of deceased persons who worked in coal mines for at least 25 years were entitled to benefits unless it was shown that the miners were not at least partially disabled from pneumoconiosis at the time of their death. 30 U.S.C. 921(c)(5). Congress repealed this presumption and the presumptions in Section 411(c)(2) and (c)(4) in 1981. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, § 202(b), 95 Stat. 1643.

[6] The regulations cross-referenced in subsection (b)(2) provide that "it will be presumed, in the absence of persuasive evidence to the contrary," that pneumoconiosis arose out of coal mine employment in the case of a claimant who worked in coal mines for ten years or more, while in cases involving miners with less experience, claimants "must submit the evidence necessary to establish that the pneumoconi-

miner who meets the medical requirements in paragraph (b)(1)(ii) of this section" (the provision relating to ventilatory test scores) is presumed to be entitled to benefits "if he has at least 10 years of the requisite coal mine employment."

Subsection (c) of HEW's regulation provides for rebuttal of the presumption. It states that the claimant is not entitled to benefits "if: (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or (2) Other evidence, including physical performance tests * * *, establish[es] that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1))."[7]

b. *The Part C program.* Initially, Part C claims were adjudicated by DOL under standards established by HEW that were more stringent in certain key respects than those applied to Part B claims.[8] In

osis" on which the claim is based "arose out of employment in the nation's coal mines." 20 C.F.R. 410.416, 410.456.

[7] The regulation cross-referenced in HEW's rebuttal provisions states that a miner "shall be considered totally disabled due to pneumoconiosis" if the disease "prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged." 20 C.F.R. 410.412(a)(1).

[8] Most significantly, the ventilatory test score standards used by DOL to determine whether miners were disabled were much more stringent than those in HEW's presumption regulation. See *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 353 (statement of Bedford W. Bird), 398 (statements of John Rosenberg and Nancy Snyder) (1974).

1978, Congress gave DOL authority to promulgate permanent regulations to govern the Part C program. It also provided in Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), that the "[c]riteria" applied to claims filed before those permanent regulations were in place "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." The permanent regulations took effect on April 1, 1980. Thus, claims filed before that date are subject to the requirement set out in Section 402(f)(2) of the Act, and therefore must be adjudicated under criteria no more restrictive than those applied to Part B claims.[9]

In response to Section 402(f)(2), the Secretary of Labor issued an interim presumption regulation, 20 C.F.R. 727.203. The invocation portion of DOL's regulation is similar to HEW's regulation in that it provides that claimants may use (1) x-ray, biopsy, or autopsy evidence, or (2) ventilatory study scores identical to those in HEW's regulation. 20 C.F.R. 727.203(a)(1) and (2). DOL's regulation goes beyond HEW's in allowing the presumption to be triggered by (3) blood-gas studies, (4) other medical evidence, including a physician's opinion, and (5) in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). The invocation portion of DOL's regulation also differs from HEW's in that it contains no provision directly comparable to subsection (b)(2), the provision stating that, in

[9] About 2,000 to 3,500 claims subject to Section 402(f)(2) are still pending. The lifetime cost of a single black lung claim has been estimated at between $118,316 and $185,656. See Employment Standards Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979*, at 32 (1980).

order to invoke HEW's presumption, the claimant had to show that "[t]he impairment * * * arose out of coal mine employment."[10]

Like HEW's regulation, DOL's regulation provides that the presumption may be rebutted by proof that a claimant (1) is doing his usual coal mine work or work comparable to it or (2) is capable of doing such work.[11] 20 C.F.R. 727.203(b)(1) and (2). Unlike HEW's regulation, DOL's regulation expressly allows rebuttal by proof that (3) "the total disability or death of the miner did not arise in whole or in part from coal mine employment" or (4) "the miner does not, or did not, have pneumoconiosis." 20 C.F.R. 727.203(b)(3) and (4). Those two rebuttal provisions are very similar to the provisions set out in Section 411(c)(4) of the Act, which provides that the presumption established in that provision may be rebutted by evidence that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of,

[10] DOL's regulation also originally differed from HEW's in that it provided that all claimants must have worked in coal mines for at least ten years in order to invoke the presumption. Under HEW's regulation, a claimant presenting x-ray, biopsy, or autopsy evidence of pneumoconiosis could invoke the presumption with less than ten years of coal mine work. This Court held in *Sebben* that in this respect DOL's regulation was more restrictive than HEW's, and hence invalid.

[11] The second of DOL's rebuttal provisions differs slightly from HEW's in that it provides that a miner's ability to do his usual coal mine work or work comparable to it is to be assessed "[i]n light of all relevant evidence." 20 C.F.R. 727.203(b)(2). HEW's regulation provides that "[o]ther evidence, including physical performance tests" where available and appropriate, may be used to rebut the presumption. 20 C.F.R. 410.490(c)(2).

or in connection with, employment in a coal mine." [12] 30 U.S.C. 921(c)(4).

2. *The three consolidated cases.* In *Pauley* v. *Bethenergy Mines*, which arose in the Third Circuit, the claimant was able to invoke the presumption because the evidence showed that the miner had pneumoconiosis, but the presumption was rebutted under DOL's third method because the evidence also showed that the miner's disability "did not arise even in part out of coal mine employment." 89-1714 Pet. App. 13. The court of appeals held that the third rebuttal provision is not invalid under Section 402(f)(2), and thus the claimant was not entitled to benefits. In the *Taylor* and *Dayton* cases, which arose in the Fourth Circuit, the claimants were able to invoke the presumption but it was rebutted under DOL's fourth method by evidence that the miners did not have pneumoconiosis. However, the court of appeals held that DOL's fourth rebuttal method is invalid under Section 402(f)(2) because, in the court's view, the question whether a claimant has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*.

a. *Pauley* v. *Bethenergy Mines.* In 1978, John Pauley applied for black lung benefits. 89-1714 Pet. App. 24-25. An ALJ concluded that Pauley had properly invoked the presumption of eligibility for benefits based on his 30 years of coal mining and on x-ray

[12] Like HEW's presumption regulation, DOL's regulation provides for additional adjudication under a set of permanent regulations for claimants who do not establish eligibility under the applicable presumption regulation. 20 C.F.R. 410.490(e), 727.203(d). For Part C claimants, these permanent regulations are either HEW's permanent regulations or DOL's permanent regulations, depending on when the claim was adjudicated. See *Sebben*, 488 U.S. at 111.

evidence showing that he had pneumoconiosis. *Id.* at 4, 36. Bethenergy Mines conceded the existence of the disease and its relationship to coal mining. *Ibid.* But it sought to rebut the presumption under DOL's third rebuttal provision by showing that, although Pauley was disabled, his disability did not arise in whole or in part from the disease. The ALJ concluded that the operator had succeeded in rebutting the presumption since the operator had shown that "pneumoconiosis is not a contributing factor in claimant's disability." *Id.* at 38. Rather, the medical evidence showed that Pauley was disabled due to arthritis and residual hemiparesis resulting from a stroke. *Id.* at 36-37. However, the ALJ went on to hold that the third rebuttal provision in DOL's regulation is contrary to Section 402(f)(2) because there is no comparable rebuttal provision on the face of HEW's regulation. Accordingly, the ALJ held that "the claimant is entitled to benefits." Pet. App. 40. The Benefits Review Board affirmed. *Id.* at 20-22.[13]

The Third Circuit reversed the award of benefits. 89-1714 Pet. App. 1-19. It began by noting that "[t]he purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal

[13] John Pauley died in December 1988, while the case was pending before the Benefits Review Board. On August 14, 1990, the Board substituted his widow, petitioner Harriet Pauley, as the claimant in this case. See 89-1714 Fed. Resp. Supp. Br. We believe that Mrs. Pauley is the proper party in this case because her husband had been found to be eligible for benefits when he died (89-1714 Pet. App. 23-41) and she became eligible for those benefits as his survivor without having to refile or otherwise validate the claim. See 30 U.S.C. 932(*l*); *Rosebud Coal Sales Co.* v. *Weigand*, 831 F.2d 926, 927-928 (10th Cir. 1987); 20 C.F.R. 725.212.

mine employment," and that the ALJ had made unchallenged findings that "Pauley's disability did not arise even in part out of coal mine employment." *Id.* at 12, 13. It then determined that Section 402(f)(2) did not require an award of benefits in that circumstance, for two reasons. First, the court did not think that Congress intended Section 402(f)(2) to preclude proof that a claimant did not have pneumoconiosis or was not disabled by the disease. Alternatively, although there was "no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education and Welfare," the court did not believe that HEW would have awarded benefits under the facts of this case. *Id.* at 17a. Thus, the court concluded, the same result was required under both regulations, so that DOL's regulation was not more restrictive than HEW's.

b. *Clinchfield Coal Co.* v. *John Taylor.* In 1976, John Taylor applied for black lung benefits. 90-113 Pet. App. 5a, 24a. An ALJ found that Taylor had properly invoked the presumption of eligibility for benefits based on his 12 years of coal mining and on blood gas tests showing an impairment in the transfer of oxygen from his lungs to his blood. *Id.* at 6a, 24-26a. The ALJ also concluded, however, that Clinchfield Coal had rebutted the presumption under DOL's third and fourth rebuttal methods by proving that Taylor was not totally disabled and, indeed, did not have pneumoconiosis. 90-113 Pet. App. 31a. The ALJ relied on negative x-ray evidence, non-qualifying ventilatory test scores, and certain medical reports that he found more persuasive than conflicting x-ray readings and other medical reports. That evidence supported the conclusion that Taylor suffered from chronic bronchitis caused by obesity and 30 years of cigarette smoking rather than from pneumoconiosis. *Id.* at 27a-31a. Accordingly, the ALJ denied benefits. *Id.* at 31a. The Benefits Review Board affirmed, concluding that the ALJ's decision was supported by substantial evidence. *Id.* at 18a-19a.

A divided Fourth Circuit reversed. 90-113 Pet. App. 4a-16a. It first dismissed the argument that DOL's regulation cannot be considered "more restrictive" than HEW's regulation as applied to Taylor because (a) he invoked the presumption based on blood gas studies, a method of invocation available under DOL's regulation but not HEW's and (b) Taylor could *not* invoke the presumption under HEW's regulation on the basis of his x-rays and ventilatory test scores. *Id.* at 11a, 27a. The court thought it "a matter of indifference" how the claimant invoked the presumption of eligibility and therefore did not accept "any argument that the rebuttal provisions must be pegged to the invocation provisions." *Id.* at 11a.

The court then determined that DOL's third and fourth rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability." 90-113 Pet. App. 12a. The court held that the additional methods violate Section 402(f)(2). The court then qualified its opinion by reading HEW's regulation as allowing a rebuttal method "similar" to DOL's third method, which authorizes rebuttal by proof that the claimant's disability was not caused by coal mine employment. 90-113 Pet. App. 14a. The court remanded the case for further consideration of that issue. *Id.* at 14a-15a.[14]

---

[14] The Fourth Circuit later retreated from the suggestion that HEW's regulation provided a method of rebuttal similar

Chief Judge Ervin dissented. 90-113 Pet. App. 15a-16a. He agreed with the majority that its decision conflicted with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (1989), and also noted a conflict with the Third Circuit's decision in *Pauley*. In his view, the decisions of those circuits upholding Labor's rebuttal provisions did "less violence to congressional intent, and avoid[ed] both upsetting the statutory scheme and raising due process problems." 90-113 Pet. App. 16a.

c. *Consolidation Coal Co.* v. *Albert Dayton*. In 1979, Albert Dayton applied for black lung benefits. 90-114 Pet. App. 3. An ALJ found that Dayton had properly invoked the presumption of eligibility for benefits based on his 17 years of coal mining and on ventilatory test scores showing a chronic pulmonary condition. *Id.* at 15, 20. The ALJ also concluded, however, that Consolidation Coal had rebutted the presumption under DOL's second rebuttal method by proving that Dayton's pulmonary impairment was not totally disabling. *Id.* at 20-24. In addition, the ALJ concluded that the medical evidence showed that Dayton did not have pneumoconiosis, so that the presumption was also rebutted under DOL's fourth method. *Id.* at 24-26. Accordingly, the ALJ denied Dayton's application for benefits. *Id.* at 27.

The Benefits Review Board affirmed. 90-114 Pet. App. 8-13. Like the ALJ, the Board concluded that the medical evidence showed that Dayton's pulmonary condition was unrelated to coal dust exposure, but was instead related to his smoking history and to other ailments. It accordingly held that the employer had rebutted the presumption under DOL's fourth method. *Id.* at 11-12. The conclusion that Dayton did not have pneumoconiosis, the Board added, would justify rebuttal under HEW's regulation as well. *Id.* at 12 n.2. The Board found it unnecessary to decide whether the ALJ had correctly concluded that the employer had rebutted the presumption under DOL's second method. *Id.* at 10 n.1.

The Fourth Circuit reversed. 90-114 Pet. App. 2-7. Relying on its decision in *Taylor* v. *Clinchfield Coal Co.* (No. 90-113), the court held that Section 402(f)(2) required Dayton's claim to be adjudicated "under the less restrictive rebuttal standards" of HEW's regulation. 90-114 Pet. App. 5. Under HEW's standards, the court stated, DOL's fourth method "should not have been available to the coal operator." *Id.* at 6. Thus, in the court's view, the finding that Dayton does not have pneumoconiosis "is superfluous and has no bearing on the case." *Id.* at 7 n.*. The court recognized that this result posed an "interesting" due process question, but decided not to consider the constitutional implications of its decision because only the Director of the Office of Workers' Compensation Programs, and not the coal mine operator, had raised the issue. *Id.* at 6.

SUMMARY OF ARGUMENT

The purpose of the Black Lung Benefits Act is to provide benefits "to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). The ALJs found that neither Taylor nor Dayton has pneumoconiosis. Pauley had simple pneumoconiosis

---

to Labor's third method. In an unpublished decision, the court concluded that the suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending, No. 90-172 (filed July 25, 1990).

and was not able to do coal mine work, but his disability was not caused, even in part, by his pneumoconiosis. Accordingly, none of the claimants has shown that he is entitled to benefits.

1. By providing for rebuttal by proof that a miner does not have pneumoconiosis, or by proof that the miner's disability did not arise from coal mine employment, DOL's regulation is not "more restrictive" than HEW's within the meaning of Section 402 (f)(2). While it is not clear exactly how HEW applied its opaque regulation, the Third Circuit correctly concluded that HEW would not have awarded benefits on the facts of these cases. A contrary conclusion—that HEW awarded benefits to miners who did not have pneumoconiosis or who were not disabled by it—would mean that the agency was using federal funds to pay benefits to claimants who were not entitled to benefits under the Act. It should not be presumed that HEW was violating the law in that manner.

Analysis of HEW's regulation confirms that claimants such as those in these cases would not have obtained benefits under the Part B program. Subsection (b)(2) of HEW's regulation states that the claimant is required to show that his impairment "arose out of coal mine employment." That provision is similar to DOL's third rebuttal provision, which authorizes rebuttal where the disability "did not arise in whole or in part out of coal mine employment." With respect to DOL's fourth rebuttal provision, HEW may have also relied on subsection (b)(2) of its regulation in concluding that miners who did not have pneumoconiosis were not entitled to benefits. Although "pneumoconiosis," when used as a medical term, refers to a disease of the respiratory system that may be caused by exposure to a variety of substances, as defined in the Act the term refers to "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). The requirement in subsection (b)(2) of HEW's regulation that the "impairment * * * arose out of coal mine employment" parallels the statutory definition of "pneumoconiosis." Thus, under a reasonable reading of subsection (b)(2), a claimant who did not have pneumoconiosis would not qualify for benefits.

2. However HEW's regulation was applied, it is clear that Congress, in enacting Section 402(f)(2), did not intend to foreclose inquiry into whether a miner has pneumoconiosis and is disabled by it. That Section did not direct DOL to apply HEW's regulation; rather, it directed DOL to apply criteria no more restrictive than those applicable to Part B claimants. The rebuttable presumption set out in Section 411(c)(4) expressly provided for rebuttal by evidence that the miner did not have pneumoconiosis or that his impairment, however disabling, was not caused by coal mine work. Surely the Congress that enacted Section 402(f)(2) would have assumed that the rebuttal methods set out in Section 411(c)(4) of the Act were available under the Part B program, even if HEW did not actually apply them. In addition, Congress had enacted a *rebuttable* presumption in Section 411(c)(1) providing that pneumoconiosis was presumed to have been caused by coal mine employment where a miner had ten years of coal mine experience, yet the claimants in this case contend that HEW applied *irrebuttable* causation presumptions.

Moreover, the Congress that enacted Section 402 (f)(2) in 1978 was undoubtedly aware of this Court's 1976 decision in *Usery* v. *Turner Elkhorn Mining Co.*,

428 U.S. 1. In that case this Court placed a gloss on Section 411(c)(3), the Part B provision establishing an irrebuttable presumption in favor of claimants proving the existence of complicated pneumoconiosis. The Court stated that although Section 411(c)(3) "does not explicitly provide that the disease must be one arising out of employment in a coal mine," it was clear under the Act "that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." 428 U.S. at 22 n.21. Congress reasonably would have thought that such a requirement applied generally under the Part B program.

A serious constitutional question would be presented by a holding that coal mine operators must pay black lung benefits in cases where they are foreclosed from presenting evidence that the miner does not have black lung disease or is not disabled by it. Cf. *Turner Elkhorn Mining*, 428 U.S. at 35. Such a holding should be avoided where, as here, it is not mandated by the statute.

Less than two months after Section 402(f)(2) was enacted, DOL proposed the regulation that the claimants have challenged. DOL's regulation set out two rebuttal methods that closely track those in HEW's regulation and two that closely track those in Section 411(c)(4). That construction of this complex statute is, at the least, reasonable. Moreover, it is plainly preferable to the claimants' alternative construction, under which black lung benefits must be awarded to claimants who are not disabled by black lung disease.

ARGUMENT

THE "CRITERIA" SET OUT IN THE REBUTTAL PROVISIONS OF THE DEPARTMENT OF LABOR'S PRESUMPTION REGULATION ARE NOT MORE RESTRICTIVE THAN THOSE APPLICABLE UNDER THE PART B PROGRAM

This Court has recognized that disability benefits are payable to a miner under the Black Lung Benefits Act "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.*, 488 U.S. at 141; see also *Sebben*, 484 U.S. at 108. That recognition follows from the declaration of purpose in Section 401(a) of the Act, which states that "Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines," and that "[i]t is, therefore, the purpose of this subchapter to provide benefits * * * to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a).

In light of this purpose, it should be plain, despite the complexity of the statute and its implementing regulations, that the Fourth Circuit erred when it held that the question whether a claimant has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*. Rather, if neither Dayton nor Taylor has pneumoconiosis (called "black lung disease" when caused by exposure to coal mine dust), neither is entitled to black lung benefits. Similarly, since "pneumoconiosis is not a contributing fact in [Pauley's] disability" (89-1714 Pet. App. 5), the Third Circuit was correct in concluding that he was not entitled to benefits.

A. None Of The Claimants Has Shown That He Would Have Obtained Benefits Under The Part B Program

Section 411(a) of the Act, the initial provision in Part B, implements the Act's declaration of purpose by directing the Secretary of Health, Education, and Welfare "to make payments of benefits in respect of total disability of any miner due to pneumoconiosis." 30 U.S.C. 921(a). Nowhere in Part B is HEW authorized to make payments to any miner who does not have pneumoconiosis or whose disability is not due, even in part, to pneumoconiosis. Nevertheless, in arguing that DOL's presumption regulation imposes more restrictive criteria than those governing the Part B program, the claimants implicitly urge that they would have obtained benefits under Part B. More specifically, they urge that they would have qualified for benefits under HEW's presumption regulation. Such a contention is necessary to the claimants' case: if they would not be entitled to benefits under HEW's regulation, the standards established by DOL are not more restrictive as applied to them than are HEW's standards under Part B.[15]

---

[15] Taylor most clearly fails to satisfy this threshold requirement. He invoked the presumption under DOL's regulation by presenting blood gas studies showing that he suffered from a respiratory impairment. That method of invocation was not available under HEW's regulation, and the ALJ concluded that Taylor's x-rays and ventilatory study scores were not sufficient to invoke the presumption under HEW's regulation. 90-113 Pet. App. 27a. Since either x-ray evidence or ventilatory study scores must be used to invoke HEW's presumption, Taylor would not have qualified for benefits under the presumption regulation governing the Part B program. Thus, the result under HEW's regulation would be the same as the result under DOL's regulation—Taylor does not qualify for benefits. Although the Fourth Circuit considered this fact irrelevant—summarily rejecting "any argument that the rebuttal provisions must be pegged to the invocation provisions" (*id.* at 11a)—we do not see how Taylor plausibly can argue that DOL's regulation is more restrictive than HEW's as applied to him.

In Pauley's view, under HEW's presumption regulation a miner who establishes that he has pneumoconiosis and that he worked in a coal mine for at least ten years must be awarded benefits if he is totally disabled, even if it is shown that the miner's disability is not caused, in whole or in part, by pneumoconiosis. Similarly, in the view of Dayton and Taylor, under HEW's regulation a miner who invokes the presumption and who is totally disabled must be awarded benefits even if it is shown that he does not have pneumoconiosis. As the Third Circuit stated, "there is no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education and Welfare" (89-1714 Pet. App. 17) and, as this Court has recognized, HEW's regulation was "drafted in a most confusing manner" (*Sebben*, 488 U.S. at 109). Notwithstanding these difficulties, we believe there is a sufficient basis to determine that HEW would not have awarded benefits to claimants if it concluded that the claimants did not have pneumoconiosis or were not disabled by it.

In our view, subsection (b)(2) of HEW's regulation includes the conditions in DOL's third and fourth rebuttal methods. Subsection (b)(2) states that in order to invoke the presumption, the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment." That provision is comparable to DOL's third rebuttal method, since subsection (b)(2) speaks of an impairment that "arose out

of coal mine employment" while DOL's third rebuttal provision authorizes the coal mine operator to show that the miner's disability "did not arise in whole or in part out of coal mine employment." [16]

With respect to DOL's fourth rebuttal method, we believe that, under subsection (b)(2) of its regulation, HEW would, and properly should, have rejected a claim where the evidence showed that the miner did not have pneumoconiosis. Although "pneumoconiosis," when used as a medical term, refers to a respiratory condition that may be caused by exposure to a variety of substances—including cotton fibers and asbestos (see note 2, *supra*)—Congress defined "pneumoconiosis" to mean "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). Subsection (b)(2) of HEW's regulation tracks the

[16] HEW issued a supplement to its Coal Miner's Benefits Manual in 1972, shortly after it promulgated its regulation, to guide claims adjudicators. (We have lodged a copy of the supplement with the Clerk of the Court and are serving a copy of the supplement on the other parties.) While the manual, like the regulation, is not crystal clear, it shows that at least some miners were barred from invoking the presumption if they could not show that they were disabled by coal mine work. Where a claimant presented x-ray evidence of pneumoconiosis and had fewer than ten years of coal mine experience, the manual made explicit that "the burden of proof rests on the claimant to establish that his pneumoconiosis arose out of" coal mine experience. Section IB6(d). In addition, a miner who presented qualifying ventilatory test scores and had ten years of coal mine experience "was *presumed* to be totally disabled due to pneumoconiosis arising out of coal mine employment," the manual said, "*if* * * * there is no evidence that *rebuts* such a finding." *Ibid.* (emphasis added). Thus, the manual contemplated (somewhat paradoxically) that "rebut[tal]" would be allowed in some circumstances *before* the presumption was invoked.

statutory definition of "pneumoconiosis" in requiring proof of an impairment that "arose out of coal mine employment." [17] Thus, the most plausible reading of subsection (b)(2) is that a miner who did not have pneumoconiosis could not invoke HEW's presumption.[18]

The statute provides with respect to the Part B program that if a miner had ten years of coal mine experience, "there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). And that presump-

[17] Subsection (b)(2) may naturally be read to do the work of both DOL's third and fourth rebuttal methods because those methods overlap to a considerable extent. In most cases, proof that a miner does not have pneumoconiosis will also establish that his disability does not arise out of coal mine employment. That is particularly clear since the statutory definition of "pneumoconiosis" (and the regulatory definition as well (see 20 C.F.R. 410.401(b)(1)) restricts the term to lung diseases arising out of coal mine employment.

[18] As noted above, HEW's benefits manual (see note 16, *supra*) stated that the presumption of entitlement to benefits could be invoked in certain circumstances only if "there is no evidence that rebuts" a finding that the claimant is totally disabled due to pneumoconiosis. Section IB6(d). Evidence showing that a claimant does not have pneumoconiosis necessarily shows that he is not disabled by it. In addition, the manual set out a third *rebuttal* provision stating that a claimant was not entitled to benefits where "[b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists." Section IB6(e)(3). While that section of the manual assumes that the presumption has been invoked, it shows, contrary to the arguments of Taylor and Dayton, that in some circumstances HEW would deny benefits to persons who did not have pneumoconiosis even though they somehow had invoked the presumption. Moreover, it shows that HEW did not construe the rebuttal methods set out on the face of its regulation as the only available methods of rebuttal.

tion is restated in HEW's regulations. See 20 C.F.R. 410.416, 410.456; cf. 20 C.F.R. 410.490(b)(3). But while the ten-year rule is a presumption that is *rebuttable*, the claimants ask this Court to conclude that HEW converted the presumption into one that is *irrebuttable*. In our view, the ten-year presumptions found elsewhere in the statute and HEW's regulations serve to shift the burden of proof to the party contesting entitlement with respect to the causation issues once the claimant makes the requisite showing, but under subsection (b)(2) the operator still has the opportunity to negate the presumption by proving that the claimant did not have pneumoconiosis or that his disability was not caused by the disease.[19]

HEW's presumption regulation, as we have readily acknowledged, is not a model of clarity. However, adoption of the claimants' interpretation would compel the conclusion that HEW was violating the law by paying federal funds to claimants who were not entitled to benefits because they were not totally disabled due to pneumoconiosis arising out of coal mine employment. As the Third Circuit stated, "it seems perfectly evident that no set of regulations * * * may provide that a claimant who is statutorily barred from recovery may nevertheless recover." 89-1714 Pet. App. 13. Because the Court presumes that federal agencies "act properly and according to law"

[19] The Third Circuit concluded that HEW's regulation allowed for proof on rebuttal that a miner did not have pneumoconiosis or was not disabled as a result of coal mine employment. 89-1714 Pet. App. 17. Some support for this alternative theory is furnished by the provision in HEW's manual that the presumption of entitlement to benefits "may be rebutted if: * * * (3) Biopsy or autopsy findings clearly establish that no pneumoconiosis exists." Section IB6(e). See note 18, *supra*.

(*FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965)), it should not conclude that HEW was paying benefits to claimants who did not qualify unduer the Act. The Court should determine instead that HEW would not have awarded benefits to such claimants and that DOL's regulation is therefore not more restrictive than HEW's regulation.

B. Section 402(f)(2) Does Not Bar A Party Contesting Entitlement From Showing That A Claimant Does Not Have Pneumoconiosis Or Is Not Disabled By The Disease

Even if HEW would have refused to consider evidence showing that a claimant did not have pneumoconiosis or was not disabled by it, Section 402(f)(2) should not be construed to require DOL to follow that course. Section 402(f)(2) does not direct DOL to adopt HEW's regulation as HEW applied it, but instead states that the "[c]riteria" applied by DOL to claims filed before DOL promulgated final regulations "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, the question is what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied.[20] In our view, Congress must have acted on the understanding that Part B claims were not allowed when the evidence showed that the

[20] The point may be illustrated by a hypothetical case involving corruption. If one criterion actually applied by HEW were that benefits were awarded to any claimant who bribed a claims adjudicator, it would certainly not be appropriate to conclude that Congress intended to compel DOL to apply the same criterion.

claimant did not have pneumoconiosis or was not disabled by it.[21]

1. The Congress that enacted Section 402(f)(2) was aware of the purposes of the Black Lung Benefits Act, and would surely have been surprised to learn—if it was true—that black lung benefits were being awarded under Part B to persons who were not disabled by black lung disease. No reasonable construction of Section 402(f)(2), and nothing in its history or background, support the conclusion that Congress intended to compel DOL to award benefits to such persons.

First, the regulatory criteria that Congress specifically addressed in enacting Section 402(f)(2) were the ventilatory test scores set out in HEW's presumption regulation. See note 8, *supra*. Those scores were incorporated, verbatim, by DOL. 20 C.F.R. 727.203(a)(2).

Second, Congress would have understood that the statutory presumptions set out in Part B of the Act

[21] The Third Circuit noted that Section 402(f)(2) is part of the definition of "total disability" and concluded that because the rebuttal provisions at issue relate to causation matters, and not directly to whether the claimant is totally disabled, the restriction in Section 402(f)(2) is inapplicable. 89-1714 Pet. App. 17. That conclusion may be difficult to reconcile with this Court's decision in *Sebben*. In that case, the Court noted that the contention that "'criteria' means total disability criteria * * * has considerable merit." 488 U.S. at 114. However, the Court went on to conclude that "to increase the requirements for the presumption of causality is necessarily to increase the requirements for the presumption of total disability" because HEW's regulation provided that "if certain evidence of the first two elements of entitlement (pneumoconiosis and causation) was established, the third element (total disability) *would automatically be presumed*." *Ibid.*

were applied to Part B claims. One of those is the presumption—expressly made *rebuttable*—that in the case of a miner with ten years of coal mine employment, "his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). Pauley contends, however, that because he showed that he had pneumoconiosis and that he worked in coal mines for more than ten years, it is *irrebuttably* presumed that he is disabled from coal mine work. And Taylor and Dayton contend that because they presented evidence of a respiratory disability and worked in coal mines for more than ten years, it is *irrebuttably* presumed that they had pneumoconiosis. As noted, we doubt that HEW actually applied its regulation in that manner. But if it did, it was acting beyond its statutory authority. Nothing in the Act establishes such irrebuttable presumptions.

Third, another relevant statutory presumption, set out in Section 411(c)(4), provides that a miner presenting "evidence demonstrat[ing] the existence of a totally disabling respiratory or pulmonary impairment" is entitled to benefits unless it is shown that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. 921(c)(4). This provision, it should be stressed, is contained in Part *B* of the Act. Congress surely may be taken to have understood that it applied to the Part B program, even if HEW actually ignored it. The two rebuttal provisions set out in Section 411(c)(4) are almost exactly the same as the DOL rebuttal methods that the claimants challenge. Because similar provisions are not explicitly set out in the rebuttal portion of HEW's regulation, the claimants contend that Congress intended to bar DOL from authorizing

rebuttal by those mehods. But those rebuttal methods were spelled out in Part B of the Act itself.

Finally, Section 402(f)(2) was enacted in 1978, two years after this Court's decision in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, the Court considered Section 411(c)(3)—the Part B provision setting out the irrebuttable presumption in favor of claimants with complicated pneumoconiosis. The Court noted that "the premise of § 411(c)(3), that the miner have a 'chronic disease of the lung,' does not explicitly provide that the disease must be one arising out of employment in a coal mine." 428 U.S. at 22 n.21. However, the Court stated, it was clear under other provisions of the Act that "an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." *Ibid.* That common-sense gloss on the statute should be applied in construing Section 402(f)(2) as well. And in view of this Court's interpretation of the irrebuttable presumption two years before enactment of Section 402(f)(2), Congress must have understood at the time of enactment that coal mine operators could not be required to pay black lung benefits to claimants who were not disabled by pneumoconiosis arising from coal mine employment. Indeed, the Conference Committee expressed its intent that "all standards are to incorporate the presumptions" set out in Section 411(c). H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).[12]

---

[12] Moreover, the Congress that enacted Section 402(f)(2) also provided that DOL was to consider "all relevant evidence," including "blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history." 30 U.S.C. 923(b). The Conference Committee made clear that the provision

2. In *Turner Elkhorn Mining*, this Court also considered a constitutional challenge by coal mine operators to the limitation on rebuttal set out in Section 411(c)(4). That limitation authorizes rebuttal only by the methods that are challenged in this case. The lower court had "judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense—that the miner is not 'totally disabled' due to pneumoconiosis." 428 U.S. at 35. The Court found it unnecessary to consider the due process issue because it held "as a matter of statutory construction that the § 411(c)(4) limitation on rebuttal evidence is inapplicable to operators." *Ibid.*

As the lower court decision in *Turner Elkhorn Mining* shows, a serious constitutional question would be presented if Section 402(f)(2) were construed to bar coal mine operators from proving that claimants are not entitled to benefits because they do not have pneumoconiosis or are not disabled by it. A construction of Section 402(f)(2) that preserves DOL's third and fourth rebuttal methods is therefore supported by the principle that, if at all possible, courts will construe a statute to avoid such problems. *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2572 (1989); *Edward J. DeBartolo Corp.* v.

---

applied to claims governed by Section 402(f)(2). H.R. Conf. Rep. No. 864, *supra*, at 16. Yet the claimants' construction of the provision leads to the result that relevant medical evidence is not considered. For example, the ALJ in Pauley's case considered ventilatory tests, blood gas studies, physical examinations, and evaluations by eight physicians (89-1714 Pet. App. 27-35) in concluding that his disability was not caused, even in part, by coal mining. The claimants contend that the ALJ should not have considered that evidence except, perhaps, insofar as it would support their claims.

Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).[23]

Because the black lung statute adjusts "the burdens and benefits of economic life," a party complaining of a due process violation must prove "that the legislature has acted in an arbitrary and irrational way." *Turner Elkhorn Mining*, 428 U.S. at 15. This test applies to laws having retrospective as well as prospective effect, but "the justifications for the latter may not suffice for the former." *Id.* at 17. Laws like this one, having retrospective effect,[24] may be upheld if they rationally "spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18.[25] However, imposing retroactive liability on employers for the benefit of employees "may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Connolly* v. *PBGC*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring) (citing, *inter alia*, *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330

[23] Contrary to the Fourth Circuit (90-114 Pet. App. 6), the Director plainly has "standing" to defend Labor's third and fourth rebuttal methods by arguing that their invalidation would raise doubts as to the constitutionality of Section 402(f)(2). Our argument with respect to the due process issue is presented in support of our statutory construction argument.

[24] Many black lung claimants (like Taylor, see 90-113 Pet. App. 6a) left coal mine work before Section 402(f)(2) was enacted in 1978.

[25] See also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 733-734 (1984) (upholding withdrawal liability provisions of Multiemployer Pension Plan Amendments Act of 1980 as a rational means of requiring employers to pay for employees' vested benefits).

(1935), in which this Court invalidated a law requiring employers to give pensions to former employees who had already been fully compensated).

When a presumption is challenged under the Due Process Clause, its validity depends "on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Mullins*, 484 U.S. at 157-158 n.30 (citation omitted). Thus, in evaluating presumptions under the black lung statute, there must be "some rational connection between the fact proved and the ultimate fact presumed." *Id.* at 159 n.32 (citation omitted).[26]

Under these standards, a substantial due process question would arise if Section 402(f)(2) were construed to prohibit coal mine operators from offering evidence to prove that a claimant is not disabled by black lung disease. A rule limiting rebuttal on the ground that such evidence is "superfluous" (90-114 Pet. App. 7 n.*) would raise a due process concern about retrospectively imposing liability on coal mine operators where there is no connection between the claimants' disability and his employment. Thus, in the present cases, where it has been decided that the claimants are not disabled as a result of their coal mine employment, serious constitutional questions would be presented if it were determined that Section 402(f)(2) requires the coal mine operators to pay black lung benefits. Those constitutional ques-

[26] Cf. *Mathews* v. *Lucas*, 427 U.S. 495, 509 (1976) (upholding conclusive presumption where relationship between presumed and proved facts is objectively probable and there is a need to avoid the burden and expense of case-by-case adjudication).

tions are avoided by our construction of Section 402(f)(2).[27]

3. The Department of Labor's interpretation of the Black Lung Benefits Act is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In light of the statute's purposes, DOL—the agency charged with its administration—permissibly construed the statute to authorize rebuttal by proof that the claimant does not have pneumoconiosis or is not disabled by it.

Indeed, heightened deference is appropriate in this case because the statute at issue is technical and complex (see *Mullins*, 484 U.S. at 138; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984)), and because DOL's construction, made contemporaneously with the statute's enactment, represents the views of the individuals charged with "setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted)). The Department proposed its interim presumption regulation, including the third and fourth rebuttal methods, less than two months after Congress enacted Section 402(f)(2) (see 43 Fed. Reg. 17,765, 17,771 (1978)), as the method of applying the new provi-

[27] In *Sebben*, the Secretary of Labor similarly contended that constitutional questions would be presented by a holding that invalidated the third and fourth rebuttal methods. Opposing counsel in *Sebben* avoided that argument by agreeing with the Secretary that "the Act does authorize her to apply the additional rebuttal methods of the DOL interim presumption." No. 87-1095 Resp. Br. 19 n.20; see 488 U.S. at 119.

sion.[28] That contemporaneous understanding provides additional support for the common-sense conclusion that the Act does not preclude rebuttal by evidence that a claimant does not have pneumoconiosis or is not disabled by it.

CONCLUSION

The judgment of the Third Circuit in No. 89-1714 should be affirmed. The judgments of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

DECEMBER 1990

[28] The Department of Labor explained in promulgating the final regulation that the rebuttal provisions satisfied Section 402(f)(2) by implementing Congress's requirement that DOL consider "all relevant evidence," and that in any case HEW did not consider its two express rebuttal provisions to be exclusive. 43 Fed. Reg. 36,826 (1978).

APPENDIX

A. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides, in relevant part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> > (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secre-

tary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

C. Section 411(c) of the Black Lung Benefits Act, 30 U.S.C. 902(c), provides:

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in

category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply

all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

(5) In the case of a miner who dies on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 922(a)(2) of this title, unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death. The provisions of this paragraph shall not apply with respect to claims filed on or after the day that is 180 days after the effective date of the Black Lung Benefits Amendments of 1981.

D. HEW's interim regulation, 20 C.F.R. 410.490, provides:

> *Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.*
>
> (a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the

lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, a[illegible]ith respect to a survivor of a miner wh[illegible]e January 1, 1974, when such su[illegible]les a claim for benefits, such [illegible]resumed to be totally disabled [illegible]oconiosis, or to have been totally d[illegible]ed due to pneumoconiosis at the time of death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.*

Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

E. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	or less than (mm. Hg.) Arterial pCO_2 equal to
30 or below	70
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60
Above 45	Any values.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the

survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this action shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20240

(7) (5) (5)

Nos. 89-1714, 90-113, 90-114

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

TIMOTHY P. CREANY
BLAIR V. PAWLOWSKI
(Counsel of Record)
603 N. Julian Street
P.O. Box 658
Ebensburg, PA 15931
(814) 472-7046

JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
343 S. Dearborn Street, Suite 700
Chicago, IL 60604
(312) 341-1070

Attorneys for Petitioner Harriet Pauley (No. 89-1714)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" rebuttal test at 20 C.F.R. § 727.203(b)(3) violates the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who meet the invocation requirements of the Department of Health, Education, and Welfare ("HEW") interim provision at 20 C.F.R. §§ 410.490(b)(1)(i) and (b)(2)?

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing a "disability causation" factual inquiry for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment to the United States Constitution?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
A. John Pauley	2
B. Statutory And Regulatory Background	3
1. "Disability Causation" And The HEW Interim Provision	3
2. The Section 402(f)(2) Compromise And The DOL Interim Regulation	7
C. This Litigation	13
SUMMARY OF ARGUMENT	14
ARGUMENT	19
I. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION	20
A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision	20

	PAGE
1. The Text Of The HEW Interim Provision	23
2. HEW's Contemporaneous Interpretation Of Its Interim Provision	26
3. Judicial Interpretations Of The HEW Interim Provision	28
4. The Circumstances Attending Adoption Of The HEW Interim Provision	28
B. The "Disability Causation" Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act	30
1. "Disability Causation" Is Among The "Criteria" That Section 402(f)(2) Encompasses	30
2. No Provision Of The Act Authorizes The Director To Depart From The Mandate Of Section 402(f)(2)	34
a. "All Relevant Evidence"	34
b. The "General Statutory Scheme"	37
c. The "Purpose" Of The Benefits Act And "Justice"	38
3. No "Clearly Expressed Legislative Intention" Contrary To The Statutory Language Justifies Any Departure From The Mandate Of Section 402(f)(2)	43

PAGE

C. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision 45

II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 47

CONCLUSION 50

TABLE OF CONTENTS (APPENDIX) I

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

CASES: PAGE(S)

Aluminum Co. v. Central Lincoln Util. Dist., 467 U.S. 380 (1984) 42, 45

Bean v. Director, O.W.C.P., 14 Black Lung Rep. 1-7 (BRB 1989) 32

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 43

Board of Governors, FRS v. Dimension Fin. Corp., 474 U.S. 361 (1986) 18, 42

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 27, 41

Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), *cert. granted* 59 U.S.L.W. 3725 (U.S. Oct. 29, 1990) (No. 90-114) 48

Director, O.W.C.P. v. Perini North River Assoc., 459 U.S. 297 (1983) 28

Local No. 82, Furniture & Piano Moving Drivers v. Crowley, 467 U.S. 526 (1984) 42, 43

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 28, 44

Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983) 28

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) .. 43, 44

Lawn v. United States, 355 U.S. 339 (1958) ... 47

Lorance v. AT & T Technologies, Inc., 109 S.Ct. 2261 (1989) 22

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) .. 43

PAGE(S)

Mullins Coal Co. v. Director, O.W.C.P., 484 U.S. 135 (1987) 20, 21, 27, 29, 36, 37

Neace v. Director, O.W.C.P., 877 F.2d 495 (6th Cir.), *modifying* 867 F.2d 264 (1989) 35

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) .. 43

Oravitz v. Director, O.W.C.P., 843 F.2d 738 (3rd Cir. 1988) 25

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 18, 39

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) ..... *passim*

Public Citizen v. U.S. Dep't of Justice, 109 S. Ct. 2558 (1989) 44

Rodriguez v. United States, 480 U.S. 522 (1987) . 42

Schweiker v. Gray Panthers, 455 U.S. 34 (1984) . 40

T.V.A. v. Hill, 437 U.S. 153 (1978) 36, 42

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 4, 19, 46-49

Weinberger v. Salfi, 422 U.S. 749 (1975) 49

Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989) 35

PAGE(S)

CONSTITUTIONAL PROVISION AND STATUTES:

U.S. CONST. amend. v ..... i, 1, 47

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969) 3

§ 422(a), 83 Stat. 796 (1969) 3

Black Lung Benefits Act of 1972, Pub. L. 92-303, 86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988): 3, 35

§ 401(a), 30 U.S.C. § 901(a) 1, 17, 18, 34, 38-40
§ 402(b), 30 U.S.C. § 902(b) 5
§ 402(f), 30 U.S.C. § 902(f) 1, 31, 33
§ 402(f)(1), 30 U.S.C. § 902(f)(1) 31
§ 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A) 24, 32
§ 402(f)(1)(C), 30 U.S.C. § 902(f)(1)(C) 30
§ 402(f)(1)(D), 30 U.S.C. § 902(f)(1)(D) 11, 30
§ 402(f)(2), 30 U.S.C. § 902(f)(2) ..... *passim*
§ 411(c), 30 U.S.C. § 921(c) 17, 37, 40
§ 411(c)(1), 30 U.S.C. § 921(c)(1) 37
§ 411(c)(2), 30 U.S.C. § 921(c)(2) 38
§ 411(c)(3), 30 U.S.C. § 921(c)(3) 17, 37, 38, 40, 48
§ 411(c)(4), 30 U.S.C. § 921(c)(4) 17, 38
§ 411(c)(5), 30 U.S.C. § 921(c)(5) 37, 38
§ 411(d), 30 U.S.C. § 921(d) 40
§ 413(b), 30 U.S.C. § 923(b) 17, 35, 37
§ 422(b), 30 U.S.C. § 932(b) 45
§ 422(c), 30 U.S.C. § 932(c) 1, 18, 19, 45-49
§ 422(j), 30 U.S.C. § 932(j) 1, 45
§ 422(j)(1), 30 U.S.C. § 932(j)(1) 45, 46

Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(a), 92 Stat. 95 (1978) ... 5

Black Lung Benefits Revenue Act of 1977, Pub. L. 95-227, § 3(a)(1), 92 Stat. 12 (1978) ... 47

PAGE(S)

Black Lung Benefits Revenue Act of 1981, Pub. L. 97-119, § 103(a), 95 Stat. 1635 (1981), codified in scattered sections of 26 U.S.C. (1988):

26 U.S.C. § 4121 45
26 U.S.C. § 9501(a)(2) 45
26 U.S.C. § 9501(d)(1) 1, 45
26 U.S.C. § 9501(d)(1)(B) 45, 46
26 U.S.C. § 9501(d)(2) 45
26 U.S.C. § 9501(d)(7) 45

28 U.S.C. § 1254(1) (1988) 1

30 U.S.C. § 902(f) (1970 & Supp. II 1972) 40

30 U.S.C. § 921(b) (1970 & Supp. II 1972) 40

REGULATIONS:

20 C.F.R.:

Part 410 ..... 8, 10, 26, 37
§ 410.410(c) 25
§ 410.412 ..... 1, 24, 25, 26, 32
§ 410.412(a)(1) 15, 23-27
§ 410.412(a)(2) 24
§ 410.414 22
§ 410.414(b) 22, 25
§ 410.414(b)(1)-(3) 38
§ 410.414(b)(4) 22
§ 410.416 ..... 7, 22
§ 410.416(a) 37
§ 410.418 38
§ 410.422(c) 25
§ 410.424(a) 25
§ 410.426(a) 24, 25, 26

PAGE(S)

§ 410.432(a) 25
§ 410.454(b) 25
§ 410.454(b)(1)-(3) 38
§ 410.456 ..... 7, 22
§ 410.456(a) 37
§ 410.458 38
§ 410.462(a) 37
§ 410.490 ..... 1, 6, 7, 19, 23, 27, 36
§ 410.490(a) 30
§ 410.490(b) 7, 21, 40
§ 410.490(b)(1)(i) ..... i, 7, 13, 15, 21, 22
§ 410.490(b)(1)(ii) 7, 22
§ 410.490(b)(2) ..... i, 7, 13, 15, 22
§ 410.490(b)(3) 7, 22
§ 410.490(c) 20, 21
§ 410.490(c)(1) 13, 15, 20, 22, 23, 24, 25, 26, 28
§ 410.490(c)(2) 13, 15, 20, 22, 23, 24, 25, 26, 28
§ 410.490(e) 38
§ 410.702(g) 38

PART 718:

Part 718 ..... 12, 37, 41
§ 718.1(b) 34
§ 718.202(a)(1)(ii)(B) 4
§ 718.203(b) 37
§ 718.204(b) 32
§ 718.303(a) 38
§ 718.304 38
§ 718.305(a) 38
§ 718.306 37
§ 718.306(a)-(c) 38
§ 718.306(c) 37

PAGE(S)

PART 725:

Part 725 46
§ 725.492(a)(1) 46
§ 725.493(a)(6) 46

PART 727:

Part 727 46
§ 727.200 34
§ 727.203 ..... 1, 6, 12, 34
§ 727.203(a) 7, 13, 21
§ 727.203(a)(1) 13, 21
§ 727.203(a)(3) 7
§ 727.203(b) 13, 19, 20
§ 727.203(b)(1) 13, 20, 24, 25
§ 727.203(b)(2) 13, 20, 24, 25
§ 727.203(b)(3) ..... *passim*
§ 727.203(b)(4) 20, 21
§ 727.203(c) 38
§ 727.203(d) 38
§ 727.205(b) 24, 25
§ 727.206(b)(2)(ii) 4

37 Fed. Reg. 18013 (1972) 22
37 Fed. Reg. 20634 (1972) 26
43 Fed. Reg. 36825 (1978) 46
45 Fed. Reg. 13678 (1980) 12

Coal Miner's Benefits Manual (Part IV) 15, 26

§ IB3(b) 22
§ IB6 27
§ IB6(c)(1)(B) 22
§ IB6(d) 22
§ IB6(e) 2, 27
§ IB6(e)(3) 2, 27
§ IB9(g) 1
§ IB9(g)(1) 27

PAGE(S)

LEGISLATIVE MATERIALS:

H.R. 4544, 95th Cong. 1st Sess. (1977) 10, 11
S. 1538, 95th Cong., 1st Sess. (1977) 10, 11, 12
H.R. Rep. No. 563, 91st Cong., 1st Sess. (1969) 4
H.R. Rep. No. 460, 92d Cong. 1st Sess. (1972) 5
S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 5, 6, 7, 22, 29, 41
H.R. Rep. No. 151, 95th Cong., 1st Sess. (1977) 8
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 864, 95th Cong., 2d Sess. (1978) 35

122 Cong. Rec. 4978 (1976) 9
123 Cong. Rec. 24266 (1977) 9
123 Cong. Rec. 29851 (1977) 10
123 Cong. Rec. 29924 (1977) 10
124 Cong. Rec. 2331 (1978) 12
124 Cong. Rec. 2334 (1978) 12
124 Cong. Rec. 3426 (1978) 12
124 Cong. Rec. 3431 (1978) 12

Coal Mine Health and Safety: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st Sess. (1969) 3

Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. (1973) .. 9

PAGE(S)

Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st and 2d Sess. (1973-74) 8

Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1978) 9

Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) ... 6-7, 8, 9, 10

Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 6, 7, 10

MISCELLANEOUS:

Briefs and Appendix—

Appendix at 2a, *Peabody Coal Co. v. Taylor*, No. 89-1696 (U.S. petition for cert. filed May 2, 1990) 36

Brief for Charlie Broyles and Lisa Kay Colley, *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) 31

PAGE(S)

Brief Of The Federal Respondent, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, 890 F.2d 1295 (3d Cir. 1989) .. 25, 32, 34, 35, 37, 47

Reply Brief for the Federal Petitioners, *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) 19

Comptroller General's Report—

General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows (1972) 3, 4, 5, 6, 28, 29

Department of Labor Reports—

1976 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act (1977) 8, 28

1978 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act (1979) 28

1988 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act (1990) 41

Other—

H. Friendly, *Benchmarks* (1967) 48

R. Posner, *The Federal Courts* (1985) 48

Stedman's Medical Dictionary (24th ed. (1982)) . 5

Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

OPINIONS BELOW

The opinion of the Third Circuit below is reported at 890 F.2d 1295. (P. App. 1-19)[1] The decision and order of the Benefits Review Board (*id.* at 20-22) and the decision and order of the administrative law judge (*id.* at 23-41) are unreported.

JURISDICTION

The Third Circuit entered its judgment on December 7, 1989. (*Id.* at 44-45) It denied a petition for rehearing on February 6, 1990. (*Id.* at 42) Petitioner filed her petition for certiorari on May 7, 1990. On October 29, 1990, this Court granted that petition, consolidating this case with Nos. 90-113 and 90-114. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c),(j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727.203; Sections IB6(e) and IB9(g) of the Coal Miner's Benefits Manual (Part IV). App. 1-13 sets forth each of these provisions.

---

[1] Citations such as "P. App. 10" are to pages of the Appendix to our Petition for Writ of Certiorari (No. 89-1714). Citations to record items not in the P. App. are to the relevant pages of the record item in the "Index of Documents" that the Department of Labor prepares for each case appealed from the Benefits Review Board to a court of appeals (*e.g.*, Tr. of Hearing at 10). The constitutional, statutory, and regulatory provisions involved are set forth in the appendix to this brief. App. 1-13.

STATEMENT

A. John Pauley.

John Pauley, petitioner Harriet Pauley's husband,[2] worked as a coal miner for thirty years in the underground mines of Pennsylvania. (P. App. 25) All his mining jobs exposed him to heavy concentrations of coal mine dust. (Tr. of Hearing at 13-14) As a "fire boss" (mine examiner), Mr. Pauley's last job in the mines, he was required to walk or crawl along three to six foot high belt line haulage ways for six to eight miles a day. (P. App. 25)

In 1974, after he had worked in the mines for 26 years, Mr. Pauley began to have great trouble breathing. (*Id.*) He also began to cough frequently and to feel fatigued. (*Id.*) These medical difficulties steadily worsened. (*Id.*) On August 2, 1978, Mr. Pauley worked in the coal mines for the last time. (*Id.*) The next day he went on sick leave. (*Id.*) He never worked again. (Tr. of Hearing at 11)

Until his death in 1988, Mr. Pauley's breathing difficulties continued to worsen progressively. (*Id.* at 21) By 1983, he had trouble breathing whenever he went outside. (*Id.* at 21; P. App. 25) And by November 1987, he could not walk more than 300 or 400 yards without becoming "out of breath" or climb any steps without becoming "short of breath." (Tr. of Hearing at 15) He also frequently wheezed and coughed and suffered "sputtering spills," especially at night. (*Id.* at 21-22; P. App. 25) He could not lift anything. (Tr. of Hearing at 15; P. App. 25)

---

[2] John Pauley died in 1988. His widow, Harriet Pauley, was thereafter substituted for him as a party in this litigation. *See* Brief of Petitioner in Reply at 2-3.

B. Statutory And Regulatory Background.

1. "Disability Causation" And The HEW Interim Provision.

Congress established the black lung benefits program in 1969[3] and charged the Secretary of Health, Education and Welfare ("HEW") with its management.[4] At the inception of the program, physicians had testified to Congress concerning the great difficulty of determining medically whether a particular miner's disability was caused by his coal mine employment or was attributable to other factors, such as cigarette smoking and mold allergy. *E.g.*, *Coal Mine Health and Safety: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 559 (1969) (testimony of William C. Hambley, M.D.). And officials of HEW's Social Security Administration ("SSA") themselves soon discovered that it was "virtually impossible to medically determine to what extent, if any, CWP [coal workers' pneumoconiosis] contributed to disability or death." General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs In Paying Black Lung Benefits To Coal Miners And Their Widows 31 (1972) [hereinafter *1972 Comptroller General's Report*]. The great uncertainty attending medical determinations of whether a miner's disabilities were attributable to coal mine em-

---

[3] The black lung benefits program was established by Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). In 1972, Title IV was amended by and became known as the Black Lung Benefits Act of 1972 (the "Act"). Pub. L. No. 92-303, § 1, 86 Stat. 150 (1972).

[4] The Act charged the Secretary of Labor with processing claims filed after December 31, 1972. Pub. L. No. 91-173, § 422(a), 83 Stat. 796. The federal respondent here, the Director, Office of Workers' Compensation Programs (the "Director"), currently administers the program for the Secretary of Labor. We refer to the "Secretary of Labor" and the "Director" interchangeably.

ployment presented the HEW officials administering the pre-1972 program with a "dilemma, that is whether it should award or deny benefits to disabled miners who are afflicted with simple CWP as well as with one or more other conditions which may be the cause of their disabilities." *Id.* at 33. "[B]ased on . . . [this] inability to medically determine if miners' disabilities were due to simple CWP or to one or more other conditions," HEW officials established a "policy . . . [of] award[ing] benefits in all such cases." *Id.* at 33. "The officials believed that—under the circumstances—resolving the problem in favor of the claimants was the only reasonable decision that could have been made." *Id.* at 34.[5]

[5] In *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1 (1976), the Court pointed out that, according to congressional testimony presented on behalf of the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated" and then stated that "[s]imple pneumoconiosis . . . is generally regarded by physicians as seldom productive of significant *respiratory* impairment." 428 U.S. at 7 (emphasis added); *see also Sebben*, 488 U.S. at 149 (Stevens, J. dissenting) (quoting *Usery*). However, the Surgeon General's testimony that the Court cited actually says that "[i]t is generally regarded by physicians that simple pneumoconiosis seldom produce[s] significant *ventilatory* impairment." H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969) (emphasis added) (testimony of Charles C. Johnson, Jr., Administrator, Consumer Protection and Environmental Health Service, HEW). The distinction between "respiratory impairment" and "ventilatory impairment" is significant because "ventilation" is only one of the three components of "respiration." §§ 718.202(a)(1)(ii)(B), 727.206(b)(2)(ii). Indeed, according to the Surgeon General's testimony, simple pneumoconiosis may well impair the capacity for "diffusion," a second component of "respiration." H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969). The Surgeon General's testimony did not suggest that simple pneumoconiosis does, or that it does not, impair the capacity for "perfusion," the remaining component. *Id.*

Moreover, "simple" and "complicated" are merely *medical* designations of the types of pneumoconiosis that x-rays can reveal. *Id.* Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the in-

(Footnote continued on following page)

Following a HEW report to Congress in 1972, a House committee recognized that the "occupational or causal connection between disability or death and pneumoconiosis has posed a very difficult problem from a medical standpoint." H.R. Rep. No. 460, 92d Cong., 1st Sess. 29 (1972). Indeed, HEW was faced with a substantial backlog of claims, and HEW officials believed that one of its "primar[y]" causes was the "lack of medical criteria for determining when miners are totally disabled due to black lung. . . ." *1972 Comptroller General's Report*, p. 3 *supra* at 2. Consistently, the Senate Labor and Public Welfare Committee, considering changes in the program to rectify this backlog of claims and an unacceptably low claims approval rate, S. Rep. No. 743, 92d Cong., 2d Sess. 3, 18 (1972), attributed both problems to two related factors. The "limited medical resources" in coal mining areas, including trained physicians and testing facilities, and the "state of the [medical] art" each made it very difficult for miners to provide the requisite medical evidence proving that the disability from which they suffered, often "severely," was caused by pneumoconiosis. *Id.* at 9, 18.

That same year, the Comptroller General, after thoroughly investigating the program, prepared a report for Con-

[5] *continued*
halation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." Stedman's Medical Dictionary 1108 (24th ed. 1982). However, the Act as amended in 1978, Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(a), 92 Stat. 95 (1978), defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments, arising out of coal mine employment.*" 30 U.S.C. § 902(b) (emphasis added). The statutory definition of "pneumoconiosis" (sometimes called "legal pneumoconiosis") is therefore broader than the medical one in that it includes all respiratory and pulmonary impairments arising out of coal mine employment. Thus, a miner may well have "legal pneumoconiosis" that contributes to his disability whether or not he has "medical pneumoconiosis" shown by x-rays.

gress. *1972 Comptroller General's Report*, p. 3 *supra*. In it he concluded that "the most significant [reason for the difficulties that have beset the program during its first three years] may be that it is virtually impossible to determine to what extent, if any, miners' disabilities or deaths can be attributed to CWP and to what extent the disabilities or deaths can be attributed to one or more other conditions." *Id.* at 40; *see also id.* at 31.

The Senate committee's report accompanying the 1972 amendments to the Act expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW officials believed that the only "practicable way" to comply with this instruction and to rectify Congress' dissatisfaction with the low claims approval rate, was to design very liberal "criteria which would detect disease," *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 194 (1977) [hereinafter *1977 Senate Hearings*] (statement of Herbert Blumenfeld, M.D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA), as distinguished from the severity or cause of a miner's disability.

HEW's product, its interim provision at 20 C.F.R. § 410.490,[6] was designed for "expediency." *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274 (1977) [hereinafter *1977 House Hearings*] (testimony of Harold I. Passes, M.D, former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA). Under the HEW interim provision, a claimant could obtain the benefit of either of two presumptions that he was "totally disabled due to pneumoconiosis." § 410.490(b). He could invoke the first presumption if x-ray, biopsy, or autopsy evidence showed that he had medical pneumoconiosis, § 410.490(b)(1)(i), and if he worked at least ten years in the mines or proved that his pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (referencing §§ 410.416, 410.456).[7] "Both presumptions were rebuttable by a showing that the miner was working or could work at his former mine employment or the equivalent." *Sebben*, 488 U.S. at 109.

[6] All citations to 20 C.F.R. are to the 1990 edition. The numerous citations in this brief to provisions of 20 C.F.R. usually omit the "20 C.F.R" reference. However, when we refer to the two principal regulatory provisions at issue here, we often call them by their popular names: the "HEW interim provision" (§ 410.490) and the "DOL interim regulation" (§ 727.203).

2. The Section 402(f)(2) Compromise And The DOL Interim Regulation.

As Congress had wished, the liberal eligibility criteria in the HEW interim presumption at § 410.490 produced a significant increase in the portion of Part B claims the agency approved, up from less than fifty percent to seventy percent. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972); *1977 Senate Hearings*, p. 6 *supra* at 165 (testimony of Richard Warden, Assistant Secretary for Legislation, HEW).

[7] Mr. Pauley's x-ray evidence and long tenure working in the mines invoked this first presumption under §§ 410.490(b)(1)(i) and (b)(2). We refer to cases like his, in which the claimant successfully invoked the HEW interim provision by x-ray, biopsy, or autopsy evidence, as "x-ray cases." A claimant could obtain the benefit of the HEW interim provision's second presumption by ventilatory study evidence, §§ 410.490(b)(1)(ii), (b)(3), as our fellow claimant in No. 90-114 did. Our fellow claimant in No. 90-113 invoked the separate DOL interim presumption by blood gas study evidence. § 727.203(a), (a)(3). Issues unique to their cases ("ventilatory study cases" and "blood gas study cases," respectively) will be discussed in their briefs.

In contrast, the Department of Labor ("DOL") approved less than ten percent of the Part C claims filed after July 1, 1973 when it adjudicated them only under the strict Part 410 permanent regulations. 1976 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 5 (1977) [hereinafter *1976 Annual Report*].

The United Mine Workers ("UMW") was extremely dissatisfied with the low DOL approval rate for Part C claims. Accordingly, in 1973 its president urged Congress to amend the Act to "provide that the interim standards . . . become the permanent standards used . . . in processing black lung claims." *Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st and 2d Sess. 349 (1973-1974) (statement of Arnold Miller, President of the UMW). Another UMW official told Congress that the UMW intended that such a provision would "assure continuation of the program at no less than the current standards" and "deal with the substantive inequities" between Part B and Part C claimants. *Id.* at 353 (statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, UMW).

Evidence presented to Congress in the years after the initiation of the Part C program demonstrated the persistence of problems that had led to promulgation of the HEW interim provision, including deficiencies in medical test procedures and an insufficient number of adequate medical testing facilities. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15, 17 (1977). Witnesses before the House Committee on Education and Labor cited in particular the continuing medical uncertainty and difficulties attending determinations about whether a miner's disability was attributable to his coal mine employment. *1977 House Hearings*, pp. 6-7 *supra* at 265 (testimony of Hans Weill, M.D.,

President of the American Thoracic Society, stating that there was "no [medically reliable] way . . . to know whether . . . lung impairment is due to pneumoconiosis or to dust or to exposure to cotton specifically or whether it is related to cigarette smoking or tuberculosis or silicosis or many of the other diseases of the lung which affect the population of the country"); *id.* at 144 (testimony of Ken Yablonski, Director of District 5, United Mine Workers, stating that there are "apparently irreconcilable diverse opinions among medical experts" in the run of cases as to whether coal workers' pneumoconiosis has "caused" disability); *Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 82 (1973) (testimony of Lowell Martin, M.D., stating that "correlating [shortness of breath] with his [a miner's] job . . . is one heck of a problem when you want to get scientific, because . . . bronchitis, emphysema, and asthma may . . . [look like] the same thing [as] pneumoconiosis").

To several congressmen, proof problems like this explained why DOL had denied benefits to so many of their coal mine constituents, when the congressmen, having personally observed the severe respiratory distress such miners regularly experienced, believed they were totally disabled due to pneumoconiosis. *See, e.g., Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. on Education an Labor*, 94th Cong., 1st Sess. 144 (1975) (remarks of Rep. Perkins); *1977 House Hearings*, pp. 6-7 *supra* at 265 (remarks of Rep. Simon); 122 Cong. Rec. 4978 (1976) (remarks of Rep. Daniels); 123 Cong. Rec. 24266 (1977) (remarks of Sen. Williams, stating that "a reason for this low claim approval rate is that . . . [m]edical evidence is often imprecise and difficult to evaluate. Symptoms can be confusing. Often . . .

doctors are not sufficiently skilled in diagnosing black lung. In many cases the illness . . . of a miner due to black lung has been attributed to some other cause."). HEW and DOL officials believed, however, that the HEW interim criteria were too liberal and had resulted in awards of benefits to some miners who were not in fact disabled due to pneumoconiosis. *1977 Senate Hearings*, p. 6 *supra* at 193-94 (testimony of Herbert Blumenfeld, M.D.); *id.* at 142, 146 (testimony of Donald Elisburg, Assistant Secretary of DOL, accompanied by June Patron, Director, O.W.C.P.); *1977 House Hearings*, pp. 6-7 *supra* at 274-75 (testimony of Harold I. Passes, M.D.).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the much lower DOL approval rate thereafter prompted new legislative proposals to achieve the same end under the Part C program. In 1977 Rep. Perkins of Kentucky introduced H.R. 4544. H.R. 4544, 95th Cong., 1st Sess. (1977). Section 7 of that bill was drafted to do what the UMW wanted done: it would have amended the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 [*i.e.*, than those applicable under the HEW interim presumption].

Id. at § 7 (1977). Thus, under the House measure, the liberal HEW interim provision would have become the restrictiveness ceiling for *all* claims filed after June 30, 1973, including claims that had previously been denied under the permanent Part 410 regulations (*i.e.*, all Part C claims). The House passed H.R. 4544. 123 Cong. Rec. 29851 (1977).

The Senate then passed S. 1538. S. 1538, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 29924 (1977). Instead of including a measure for adjudicating claims under standards "not . . . more restrictive" than those of the HEW interim provision, Section 2 of the Senate bill directed the Secretary of Labor to develop new permanent standards for all Part C claims that would "accurately reflect total disability in coal miners. . . ." *Id.* at § 2. Dissatisfied with DOL's low claims approval rate, the members of the Senate Committee that sent the bill to the floor "assumed that the [permanent] regulations regarding what constitutes 'total disability,' which will be promulgated by the Secretary of Labor, will be equivalent to the [HEW] interim medical standards." S. Rep. No. 209, 95th Cong., 1st Sess. 25 (1977); *see also id.* at 14. At the same time, the terms of the Senate bill itself clearly authorized the Secretary of Labor to promulgate eligibility standards for Part C claims that differed in their degree of restrictiveness from those found in the HEW interim provision. As HEW and DOL officials were on record as believing that the HEW interim provision was far too liberal and had resulted in benefit awards to some claimants who were not disabled due to pneumoconiosis, *see* p. 10 *supra*, the industry had every reason to expect that DOL's permanent standards would in fact be much stricter than the HEW interim standards. Accordingly, the Senate bill was much more favorable to the industry than the House bill.

The bill that emerged from the conference committee charged with considering the House and Senate bills embodied an outcome that compromised the legislative ambitions of both the miners and the industry. What had been Section 7 of H.R. 4544, the UMW measure, was enacted as Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2). It required the application of "criteria . . . not . . . more restrictive" than those under the liberal HEW provision, but only as to pending claims, previously denied claims, and claims filed before the effective date of new permanent regulations the Secretary of Labor was to develop. *Id.*

What had been Section 2 of S. 1538, the industry measure, was enacted as Section 402(f)(1)(D) of the Act, 30 U.S.C. § 902(f)(1)(D). It required the application of "criteria . . . which accurately reflect total disability in coal miners" to all claims filed after the effective date of the new permanent regulations the Secretary was to develop. *Id.*[8]

Legislators in both houses that spoke to the compromise measure after it emerged from conference emphasized that they understood it to ensure parity—equal treatment—of Part B claimants and those Part C claimants subject to Section 402(f)(2). For example, Rep. Perkins, the House manager of the bill, stated that "all of the denied and pending claims subject to review under the legislation will be evaluated according to the [HEW] 'interim' standards," which "will continue to apply into the future as well, until such time as the Secretary of Labor promulgates new [permanent] regulations. . . ." 124 Cong. Rec. 3426 (1978). He also stated that "this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the [HEW] interim standards. . . ." *Id.* at 3431. Similarly, Sen. Javits stated: "I believe it would be inequitable, and contrary to sound program administration, if the Departments of Labor and HEW were to give disparate treatment to claimants in carrying out their dual responsibilities. . . ." *Id.* at 2334 (1978). *See also, e.g., id.* at 2331 (statement of Sen. Randolph, the Senate manager of the bill).

As its response to the "not . . . more restrictive" mandate in Section 402(f)(2), DOL promulgated its own interim regulation at § 727.203. This regulation, like the HEW interim provision, permits a miner to invoke a presump-

[8] These new permanent regulations were eventually promulgated at 20 C.F.R. Part 718, effective March 31, 1980. 45 Fed. Reg. 13678 (1980).

tion that he is "totally disabled due to pneumoconiosis" if, *inter alia*, x-ray, biopsy, or autopsy evidence establishes that he has pneumoconiosis. §§ 727.203(a), (a)(1). Unlike the HEW interim provision, however, the DOL interim regulation permits rebuttal of its presumption by any of four methods. § 727.203(b).

C. This Litigation.

John Pauley filed a claim for black lung benefits on April 21, 1978. (P. App. 25) The medical evidence submitted at the hearing on his claim included 11 x-rays dating from January 1975 to September 1987, all of which showed that Mr. Pauley suffered from pneumoniosis. (*Id.* at 26) Mr. Pauley's employer, Bethenergy Mines, Inc. ("Bethenergy") conceded, and the Administrative Law Judge ultimately found, both that Mr. Pauley had pneumoconiosis and that it had arisen out of his coal mine work. (*Id.* at 36) Hence, the ALJ concluded that Mr. Pauley, who had worked thirty years in the mines (*id.* at 25), successfully invoked both the DOL interim regulation by satisfying §§ 727.203(a)(1) (*id.* at 36) and the HEW interim provision by satisfying §§ 410.490(b)(1)(i) and (b)(2). (*Id.* at 39)

The ALJ also found that Mr. Pauley had not worked for the previous ten years and that his afflictions were severe enough to be totally disabling. (*Id.* at 36) On this basis the ALJ concluded that Bethenergy had rebutted neither the DOL interim regulation under § 727.203(b)(1) or (b)(2) (*id.*) nor the HEW interim provision under § 410.490(c)(1) or (c)(2). (*Id.* at 39-40) The ALJ further determined that three of the physicians who examined Mr. Pauley submitted opinions concluding that Mr. Pauley's disability arose, in whole or in part, out of coal mine employment (*i.e.*, that Mr. Pauley had established "disability causation"). (*Id.* at 30, 32-33, 38) But the ALJ determined that the opinions of four other physicians were to the contrary (*id.* at 29-34,

37) and concluded that Bethenergy had rebutted the DOL interim presumption under the "disability causation" rebuttal test at § 727.203(b)(3). (*Id.* at 38)[9]

The ALJ nonetheless awarded Mr. Pauley benefits because § 727.203(b)(3) was not present in the HEW interim provision, so that applying that rebuttal test to deny benefits would violate Section 402(f)(2) of the Act under then-governing Third Circuit case law. (*Id.* at 39-40) The Benefits Review Board affirmed. (*Id.* at 20-22) However, the Third Circuit reversed with directions to enter an order denying benefits. (*Id.* at 1-19)

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Pauley's using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires reversal of the court of appeals' judgment and reinstatement of the ALJ's benefits award.

A. The DOL interim regulation's "disability causation" rebuttal test at § 727.203(b)(3) is a more restrictive criterion than the criteria of the HEW interim provision. Unlike the DOL interim regulation, the HEW interim provision does not authorize benefit denials based upon a fac-

[9] The ALJ counted Drs. Bradley and Lantos as two of four doctors whose opinions he believed opposed Mr. Pauley under § 727.203(b)(3). (P. App. 37) However, the ALJ's accurate descriptions of the admissions that Drs. Bradley and Lantos made when testifying indicate that the ALJ should instead have counted them as two of five doctors whose opinions supported Mr. Pauley under § 727.203(b)(3). (*Id.* at 31-32) ("Dr. Bradley did admit that he could not rule out entirely any contribution of coal dust and silica inhalation . . . to claimant's overall impairment. . . ."); (*id.* at 34) (Dr. Lantos "admitted" that Mr. Pauley's "occupationally acquired pulmonary disease . . . may be a detrimental aspect of his overall condition.")

tual determination adverse to the miner respecting "disability causation." Rather, under the HEW interim provision, "disability causation" is conclusively presumed when a miner proves, as Mr. Pauley did, that he has pneumoconiosis as shown by x-ray, biopsy, or autopsy evidence, § 410.490(b)(1)(i), and that his pneumoconiosis arose out of his coal mine work, § 410.490(b)(2), and his opponent is unable to prove that he is performing, or is able to perform, his prior coal mine work or its equivalent. §§ 410.490(c)(1),(2). The court below disagreed, holding that parenthetical citations to § 410.412(a)(1) in the rebuttal subsections of the HEW interim provision, §§ 410.490(c)(1) and (c)(2), implicitly incorporate a "disability causation" factual inquiry like the one in the DOL interim regulation at § 727.203(b)(3). But the court's conclusion is incompatible with every authoritative source guiding the search for the meaning of legal tests.

1. The text of the HEW interim provision itself contradicts the court's conclusion. The subsections of the HEW interim provision that contain the parenthetical citations also contain substantive texts, which address only the "disability severity" element of a claim, a different element than "disability causation." Thus, reading the parenthetical citations to refer to "disability causation" would be counter-intuitive. Moreover, the ten other sections of the regulations that contain identical or related parenthetical citations are all in harmony with our position that the HEW interim provision lacks a "disability causation" factual inquiry and contradict the court of appeals' contrary reading.

2. The conclusion of the court below is also incompatible with HEW's contemporaneous interpretation of its interim provision that it set forth in Part IV of its Coal Miner's Benefits Manual as well as with the judicial interpretations of the HEW interim provision. More than 400,000

claims have been adjudicated under the HEW interim provision, producing hundreds, if not thousands, of published decisions in x-ray cases. But we are unaware of any such decision, other than the one below, in which any adjudicator, at any administrative or judicial level, construed the HEW interim provision to permit a "disability causation" factual inquiry. Indeed, the reported decisions uniformly support our position that the HEW interim provision contains no such factual inquiry.

3. HEW's omission of a "disability causation" factual inquiry from its interim provision was a reasonable and lawful agency decision that was directly responsive to Congress' wishes. The HEW officials charged with administering the black lung program and with drafting the HEW interim provision believed that the task of determining medically whether a miner's disability arose out of his coal mine employment was "virtually impossible" and that the tasks of accumulating medical opinions regarding "disability causation" and of thereafter resolving conflicting determinations of the issue had contributed greatly to the backlog of claims that Congress had found objectionable and said it wanted eliminated. In this context, excluding a "disability causation" factual inquiry from the HEW interim provision effectuated the entirely reasonable conclusion of what appears to have been an agency cost/benefit analysis: it was so highly probable that the disabilities of totally disabled miners with pneumoconiosis arose, at least in part, from their coal mine work, that requiring individual factual determinations of "disability causation" was unjustified in light of the costs of making such determinations.

B. The "disability causation" rebuttal test at § 727.203 (b)(3) of the DOL interim regulation violates the "not . . . more restrictive" mandate in Section 402(f)(2). This Court's decision in *Sebben* and the Secretary of Labor's own interpretations of the statute in his regulations foreclose any argument that the word "criteria" in Section 402(f)(2) excludes the "disability causation" criterion. Indeed, the Director did not argue otherwise below but instead contended erroneously that other provisions of the Act or "directives" in the legislative history "justified" his "departure" from Section 402(f)(2)'s mandate. Similarly, the court of appeals, relying principally on the "purpose" provision of the Act at Section 401(a), 30 U.S.C. § 901(a), incorrectly rejected our reading of Section 402(f)(2).

1. The Director argued below that his departure from Section 402(f)(2)'s mandate is justified by a direction in a committee report for him to consider "all relevant medical evidence" in adjudicating claims and by a similar clause in Section 413(b) of the Act, 30 U.S.C. § 923(b). The Director, however, has confused the word "evidence" with the word "criteria," which also appears in the passage from the committee report. Properly read, the "all relevant medical evidence" passage in the committee report does not even suggest, much less require, that he adjudicate claims using additional "criteria" that are more restrictive than the criteria of the HEW interim provision.

2. The Director also argued below that the presumptions at Section 411(c) of the Act, 30 U.S.C. § 921(c)(1)-(5), require that any presumption the Director applies to Section 402(f)(2) claims be fully rebuttable. However, by their terms, the presumptions at Sections 411(c)(3) and 411(c)(4) are themselves irrebuttable and partially rebuttable, respectively. Properly understood, the Director's argument is that Section 402(f)(2) should be read to prohibit the Secretary of Labor from applying presumptions to Section 402(f)(2) claims that differ in any respects from the presumptions in Section 411(c). If accepted, however, such an argument would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2).

3. The court of appeals treated as "outcome determinative" its view that our reading of Section 402(f)(2) contradicts the stated "purpose" of the Act, set forth in Section 401(a), to provide benefits to coal miners who are totally disabled due to pneumoconiosis. However, Section 402(f)(2), enacted nine years after Congress established the black lung benefits program and wrote Section 401(a), was part of a congressional compromise that resolved a legislative struggle between coal miners and the industry. The outcome Congress wanted in enacting Section 402(f)(2), the provision the miners won in the compromise, was, for a temporary period, to assure the continued liberality of black lung awards and to bring the standards applied to Part C claims into parity with the standards applied to Part B claims. Significantly, the court of appeals overlooked these facts and the text of Section 402(f)(2) itself in arriving at its erroneous "outcome determinative" reliance on the "purpose" of the Act at Section 401(a). For the decisions of this Court teach unflagging respect for the texts of statutory provisions that incorporate congressional compromises, even compromises in which the statutory texts dictate results that do not square with the "purposes" of the enactments that include the compromise provisions. *E.g. Board of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). Indeed, here the court of appeals' failure to respect the text of Section 402(f)(2) led it to a result that would defeat the very outcome Congress sought in enacting that provision. The court of appeals' view that there is a conflict between Section 402(f)(2), as we read it, and Section 401(a) is, in any event, without merit, in part because Section 401(a) contains no operative requirements at all, much less any "disability causation" requirement. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18-27 (1981).

C. A coal operator who shows under Section 422(c) of the Act, 30 U.S.C. 932(c), that its mines did not cause

the disability of the miner, thereby shifts liability to the Black Lung Disability Trust Fund for payment of benefits to a claimant who prevails under Section 402(f)(2) and the HEW interim provision.

D. The opportunity that Section 422(c) affords a coal operator to prove that its mines did not cause the disability of the miner is an even broader opportunity than the one Bethenergy incorrectly says would be unconstitutionally absent from the statutory scheme if Section 402(f)(2) were read as we say it must be. Section 422(c) is therefore a complete answer to the due process challenge Bethenergy raises to Section 402(f)(2) as we read it. Moreover, even if the Act lacked a provision like Section 422(c), this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) would establish that Section 402(f)(2), as we read it, is constitutional.

ARGUMENT

Pittston Coal Group v. Sebben, 488 U.S. 105, 113-16 (1988), teaches that the "not . . . more restrictive" mandate in Section 402(f)(2) of the Act means that the "criteria" the Secretary of Labor is to apply under § 727.203 must be at least as favorable to the individual black lung claimant as the "criteria" of the HEW interim provision at § 410.490. The questions here, left open in *Sebben*, are: (1) whether any *rebuttal* provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *Id.* at 119.[10]

[10] In *Sebben* the Secretary of Labor, after acknowledging that the DOL interim regulation *did* include rebuttal methods not set forth in the HEW interim provision, Reply Brief for the Federal Petitioners at 5, argued that "there is *no basis* for drawing a line

(Footnote continued on following page)

I. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION.

A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision.

Both the HEW interim provision and the DOL interim regulation include rebuttal tests. §§ 410.490(c), 727.203(b). All the rebuttal tests in the two provisions enumerate ways that the presumptions of eligibility that the respective provisions provide, once invoked, may be defeated. *Sebben*, 488 U.S. at 109; *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 143-44, 154 (1987).

The first two rebuttal tests of the DOL interim regulation, §§ 727.203(b)(1) and (b)(2), are substantially the same as, and thus do not set forth more restrictive criteria than, the only two rebuttal tests of the HEW interim provision, §§ 410.490(c)(1) and (c)(2). And although the DOL interim rebuttal test at § 727.203(b)(4) lacks a discrete companion test in the HEW interim provision, it does not set forth more restrictive criteria than those in the HEW interim provision with respect to x-ray cases like Mrs. Pauley's. The rebuttal test at § 727.203(b)(4) permits the claimant's opponent to defeat the claim by proving that "the miner does not, or did not, have pneumoconiosis." § 727.203(b)(4).

[10] *continued*
that permits alteration of the rebuttal provisions [of the HEW interim provision], but not the affirmative [*i.e.*, invocation] factors . . . ." *Sebben*, 488 U.S. at 119 (emphasis added). When *Sebben* held that the Secretary's "alteration" of one of the invocation factors of the HEW interim provision *did* violate Section 402(f)(2), the Director's position in that case became a concession of the questions presented here. The Secretary, however, has backed away from this concession in these consolidated cases.

But this Court recognized in *Mullins*, 484 U.S. at 151 and n. 26, that § 727.203(b)(4) is not available in x-ray cases because to invoke the DOL interim regulation by x-ray, biopsy, or autopsy evidence under § 727.203(a)(1), the claimant must prove affirmatively, based on all such evidence, that he does have pneumoconiosis. § 727.203(a)(1). The same result obtains under the HEW interim provision in x-ray cases since § 410.490(b)(1)(i) is identical to § 727.203(a)(1). *See Mullins*, 484 U.S. at 154-55 and n. 27.

The DOL rebuttal test at § 727.203(b)(3), which also lacks a discrete companion test in the HEW interim provision, works differently than § 727.203(b)(4). Except for the court below, the four courts of appeals that have addressed the issue, as well as the Benefits Review Board, have agreed with us that § 727.203(b)(3) *does* set forth a "criteri[on]" that is more restrictive than those in HEW interim provision because § 727.203(b)(3) permits a claimant's opponent to defeat the claim in a way the HEW interim presumption does not. *Compare* cases cited in Petition at 20 *with* P. App. 17. Both interim provisions provide that a claimant who satisfies the requirements of their respective invocation subsections will, *inter alia*, "be presumed to be totally disabled *due to* pneumoconiosis." §§ 410.490(b), 727.203(a) (emphasis added). Both interim provisions therefore confer the presumption that the miner's disability "arises out of coal mine employment" (*i.e.*, "disability causation"). *See* n. 5 *supra* (explaining that, under Act and regulations, the term "pneumoconiosis" includes all respiratory or pulmonary impairments arising out of coal mine employment). Under the DOL interim regulation, the test at § 727.203(b)(3) allows this presumption of "disability causation" to be rebutted. In contrast, the HEW interim provision contains no provision, either in its invocation subsection, § 410.490(b), or in the rebuttal subsection, § 410.490(c), that directs any factual

inquiry concerning "disability causation."[11] "Disability causation" is conclusively presumed under the HEW interim provision.[12]

---

[11] The dissenters in *Sebben* believed that § 410.490(b)(3) pertains to "disability causation" and contains a "scrivener's error" that should be corrected so that the section applies to x-ray cases like Mrs. Pauley's, not to ventilatory study cases, to which the express terms of the section say it applies. *Sebben*, 488 U.S. at 128-30 (Stevens, J., dissenting). The majority, however, rejected this "scrivener's error" formulation, *id.* at 119-20; and it is the majority's "construction . . . that becomes a part of the law." *Lorance v. AT & T Technologies*, 109 S.Ct. 2261, 2269 (1989) (Stevens, J., concurring). In any event, to the extent § 410.490(b)(3) addresses "disability causation," it does not set forth a "disability causation" factual inquiry but provides that "disability causation" is "presumed" for miners who worked in the mines at least ten years.

The dissent premised its "scrivener's error" formulation on its assumption that HEW, among others, must have intended that § 410.490(b)(3)'s ten-year mining duration requirement for claimants apply to x-ray cases, which would not otherwise have been subject to any mining duration requirement, rather than to ventilatory study cases, which were already subject to the 15-year mining duration requirement at § 410.490(b)(1)(ii). *Id.* at 130. The dissent's assumption conflicts with HEW's contemporaneous interpretation of its interim provision embodied in Part IV of its Coal Miner's Benefits Manual. *See* Manual at § IB6(d) (paralleling in part § 410.490(b)(3) and indicating that § 410.490(b)(3)'s ten-year mining duration requirement applies only to ventilatory study cases); *see also* Manual at § 1B6(c)(1)(B) (paralleling § 410.490(b)(1)(ii)). The Manual deserves substantial deference. *See* p. 27 *infra*. The source of the ten-year requirement for ventilatory study cases appears to be § 410.414(b)(4) of HEW's permanent regulations. *See* Manual at § IB6(d) (citing § IB3(b), which parallels § 410.414 in part); *see also* 37 Fed. Reg. 18013 (1972) (proposed version of § 410.490(b)(3), citing § 410.414(b)); S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972) (congressional directive that § 410.414(b)(4) effectuates).

[12] In x-ray cases, the HEW interim provision thus requires the claimant to provide affirmative proof that he has "pneumoconiosis," § 410.490(b)(1)(i), accompanied by affirmative proof that it arose out of coal mining (or that he mined for at least 10 years), § 410.490(b)(2) (citing §§ 410.416, 410.456), and allows the opponent to defeat the claim by showing that the claimant's afflictions are not severe enough to be totally disabling. §§ 410.490(c)(1), (c)(2). That the

(Footnote continued on following page)

The only court ever to disagree is the court below. The Court observed that §§ 410.490(c)(1) and (c)(2) of the HEW interim provision parenthetically cite § 410.412(a)(1), which, the court said, "refers to a miner being 'totally disabled due to pneumoconiosis.' " P. App. 17. On this basis, it held that these parenthetical citations to § 410.412(a)(1) implicitly incorporated into the HEW interim provision a "disability causation" rebuttal test like the one at § 727.203(b)(3) of the DOL interim regulation. *Id.*

Every authoritative source guiding the search for the meaning of legal texts contradicts the court of appeals' holding.

1. The Text Of The HEW Interim Provision. The parenthetical citations to § 410.412(a)(1) in the HEW rebuttal provisions refer to the definition of "comparable and gainful work," the term-of-art that immediately precedes the citation. Subsection 410.412(a)(1) sets forth the definition of "comparable and gainful work": "*gainful* work in the immediate area of his [the miner's] residence requiring the skills and abilities *comparable* to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, '*comparable and gainful work*' . . .) . . . ." § 410.412(a)(1) (emphasis added). Because this definition is neither intuitively obvious nor set forth elsewhere in § 410.490, the citations to § 410.412(a)(1)'s definition of "comparable and gainful work" provide the clarification of §§ 410.490(c)(1) and (c)(2) that the drafters of § 410.490 reasonably believed they had an obligation to provide.

---

[12] *continued*
HEW interim provision affords eligibility to miners who thereby invoke the presumption and withstand rebuttal without an inquiry into "disability causation" means only that, in any individual case, there will be no occasion to determine *whether or not* the miner's pneumoconiosis in fact contributed to his disability.

The court below believed that the parenthetical citations to § 410.412(a)(1) in the two HEW rebuttal provisions refer to a different aspect of § 410.412(a)(1), the "disability causation" component of "total disability."[13] But §§ 410.490(c)(1) and (c)(2) have substantive texts as well as the parenthetical citations, and their substantive texts, which the court completely ignored, both address only the "disability severity" component of the definition of "total disability" at § 410.412, not the "disability causation" or "disability duration" aspect of that definition. *See* n. 13 *supra*. Thus, the natural reading of the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) is that they refer only to the definition of "comparable and gainful work" since that definition alone explains and clarifies the "disability severity" component of the term "total disability," the only component that the substantive texts of §§ 410.490(c)(1) and (c)(2) themselves address.

Reading the parenthetical citations to § 410.412(a)(1) in the HEW rebuttal provisions to refer only to the definition of the term "comparable and gainful work" also harmonizes these citations with citations in other regulatory sections. Besides the citations in the HEW rebuttal provisions, one section of HEW's permanent regulations, § 410.426(a), and three sections of DOL's regulations, §§ 727.203(b)(1), 727.203(b)(2) and 727.205(b), also contain parenthetical citations to § 410.412(a)(1). As in the two HEW interim rebuttal provisions, the citations to § 410.412(a)(1)

[13] As we explain more fully in § I.B *infra*, this Court's definition of "total disability," like the statutory definition at Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), expressly includes two components: (1) that the miner's afflictions be severe enough that he is unable to perform "comparable and gainful work" ("disability severity"); and (2) that he is disabled because of pneumoconiosis ("disability causation"). *Sebben*, 488 U.S. at 114. The regulatory definition of "total disability" at § 410.412 adds a third component, which specifies how long a miner must be disabled ("disability duration"). § 410.412(a)(2).

in all of these other provisions appear immediately after the term "comparable and gainful work." And although the citations to § 410.412(a)(1) otherwise arise in varying contexts in the sections, none is compatible with the conclusion that it might also refer to the "disability causation" aspect of § 410.412.[14] In contrast, six other sections of the regulations—§§ 410.410(c), 410.414(b), § 410.422(c), 410.424(a), 410.432(a), and 410.454(b))—refer to the *entirety* of § 410.412, which sets forth the full, three-component definition of "total disability," not merely the definition of the "disability severity" component ("comparable and gainful work"). In all six of these sections, the citation to § 410.412 appears with, and necessarily refers to, the

[14] Reading the citations to § 410.412(a)(1) in the HEW rebuttal provisions to refer to "disability causation" thus would make hash of the identical citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) of the DOL interim regulation, the companion provisions to §§ 410.490(c)(1) and (c)(2). This is because the Secretary of Labor set forth an express and distinct "disability causation" test at § 727.203(b)(3) of the DOL interim regulation, an unnecessary exercise if the citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) were themselves meant to set forth such a test. Indeed, the Director himself acknowledged in the court below that the citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) do not refer to "disability causation" but refer only to the definition of "comparable and gainful work." Brief of the Federal Respondent at 19 n. 9, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, P. App. 1 [hereinafter *Dir. 3d Cir. Br.*] The case law required that concession. *E.g., Oravitz v. Director, O.W.C.P.*, 843 F. 2d 738, 739-40 (3d Cir. 1988) (citing cases).

In § 410.426(a), the citation to § 410.412(a)(1) cannot be read to refer to the "disability causation" aspect of § 410.412 because the sentence immediately *after* the parenthetical citation to § 410.412(a)(1), to which the parenthetical citation cannot refer, sets forth the "disability causation" requirement for cases adjudicated under the HEW permanent regulations. § 410.426(a)(1).

In § 727.205(b), the citation to § 410.412(a)(1) cannot be read to refer to the "disability causation" aspect of § 410.412 because, among other reasons, the entire 66-word text of the subsection addresses only the level of severity of deceased miners' afflictions before their deaths. § 727.205(b).

term "total disability" or "totally disabled." Thus, the regulations consistently cite § 410.412*(a)(1)* to refer only to the definition of the term-of-art "comparable and gainful work" and consistently cite § 410.412 *in its entirety* to refer to components of "total disability" other than, or in addition to, the "disability severity" component.

Moreover, it is difficult to understand why, if HEW meant to incorporate a "disability causation" inquiry into its interim provision, it would have chosen to do so through cryptic cross-references rather than delineating such an inquiry separately, especially since HEW did just that in the permanent Part 410 regulations that it promulgated simultaneously with the HEW interim provision. § 410.426(a). In addition, that HEW inserted identical parenthetical citations to § 410.412(a)(1) both in § 410.490(c)(1) and in § 410.490(c)(2) conflicts with the court's conclusion that the citation incorporated a *single* "disability causation" rebuttal test. *See* P. App. 17. Finally, applying a "disability causation" test to the claims of miners described in § 410.490(c)(1) makes no sense because such miners must still be performing their usual coal mine work or comparable and gainful work and therefore lack the functional "disability" as to which any "causation" could be determined.

2. HEW's Contemporaneous Interpretation of Its Interim Provision. On October 17, 1972, less than three weeks after HEW's interim provision became effective as a regulation, 37 Fed. Reg. 20634 (1972), HEW supplemented Part IV of its existing Coal Miner's Benefits Manual (the "Manual").[15] That supplement set forth in detail HEW's understanding of its interim provision, including the requirements for invoking and for rebutting it. Manual at § IB6. The Manual nowhere suggests that the interim provision allows, much less requires, any "disability causation" factual inquiry. In particular, the section of the Manual that parallels the two HEW interim rebuttal tests does *not* include a cross-reference to any regulatory or Manual provision pertaining to "disability causation." Manual at § IB6(e).[16] As a contemporaneous and detailed interpretation of its own interim regulation, HEW's Manual "deserves substantial deference" because it is not "plainly erroneous or inconsistent with the regulation." *Mullins*, 484 U.S. at 159 (citation omitted).[17]

[15] We have lodged a copy of the Manual with the Clerk of this Court and served copies upon all other parties in these consolidated cases.

[16] The only cross-reference accompanying the section of the Manual paralleling the two HEW rebuttal tests is to "subsection IB9(g)(1) of TI #21." That provision of the Manual is in a section dealing with the definition of "comparable and gainful work." This cross-reference in the Manual strongly supports our reading of the cross-references to § 410.412(a)(1) in the HEW rebuttal provisions themselves. Moreover, the Manual supplements the two rebuttal tests enumerated in the text of the HEW interim provision with an additional rebuttal test that is not enumerated in the text of the provision—that the presumption will be rebutted "if [b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists." Manual § IB6(e)(3). That the Manual added only this rebuttal test further emphasizes the absence of a "disability causation" rebuttal test or other "disability causation" inquiry in the HEW interim provision.

[17] DOL's recent contrary interpretation of HEW's interim provision is not entitled to any deference. As a regulatory provision, § 410.490 was HEW's rule, so that HEW, not DOL, is the agency to whom any deference is owing. *Mullins*, 484 U.S. at 159. To be sure, Congress elevated the HEW interim provision to statutory status when it enacted Section 402(f)(2). *See* p. 39 *infra*. However, DOL's interpretation of the HEW interim provision as a statutory provision is not entitled to any deference because the provision is not "silent or ambiguous" with respect to its exclusion of a "disability causation" factual inquiry. *Chevron, USA v. Natural Resources Defense Council*, 476 U.S. 837, 843 and n. 9 (1984). The text of the HEW interim provision makes this clear, *see*, § I.A.1 *supra*; and this conclusion is only reinforced by the interpretations of it in the case law, *see* § I.A.3 *infra*, and that HEW

(Footnote continued on following page)

3. Judicial Interpretations of the HEW Interim Provision. Over 400,000 claims have been adjudicated under the HEW interim provision. *1976 Annual Report*, p. 8 *supra* at 4; 1978 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 21 (1979). And these adjudications have produced hundreds, if not thousands, of published decisions involving x-ray cases. Yet neither the Director nor Bethenergy has cited, and we are unaware of, any such decision, other than the decision below, in which any adjudicator, at any administrative or judicial level, construed the HEW interim provision to permit a "disability causation" factual inquiry. To the contrary, the federal court cases reviewing the administrative decisions of HEW uniformly interpreted the HEW interim provision to include only the two rebuttal tests at §§ 410.490(c)(1) and (c)(2) and did not read either of them or any other part of the HEW interim provision to entail a "disability causation" inquiry. *E.g.*, *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 285 (6th Cir. 1983).

4. The Circumstances Attending Adoption of the HEW Interim Provision. The HEW officials charged with administering the black lung program and with drafting the HEW interim provision believed that the task of determining medically whether a miner's disability arose out of his coal mine employment was "virtually impossible." *1972 Comptroller General's Report*, p. 3 *supra* at 31.

[17] *continued*
set forth in its Manual, *see* § I.A.2 *supra*, all of which Congress is presumed to have been aware when it elevated the HEW interim presumption to statutory status. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Director, O.W.C.P. v. Perini North River Assoc.*, 459 U.S. 297, 319-20 (1983) (law that Congress is presumed to know includes judicial decisions).

Indeed, the agency found such determinations so difficult that, even before it promulgated the HEW interim provision, it had established a policy of awarding benefits, without making a "disability causation" determination, to disabled claimants who had coal workers' pneumoconiosis and one or more other conditions. *Id.* at 33.[18] Nonetheless, the time it took physicians to make such determinations and then for adjudicators to resolve conflicting determinations contributed greatly to the backlog of claims that Congress had found so objectionable and had said it wanted eliminated. *1972 Comptroller General's Report*, p. 3 *supra* at 2; *see also* S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). At the same time, HEW "could reasonably have concluded that it is highly probable that a person who engaged in coal mine employment for over a decade [like Mr. Pauley] is totally disabled as a result of pneumoconiosis arising from that employment if he or she can prove," *inter alia*, that he or she has pneumoconiosis shown by x-ray, biopsy or autopsy evidence. *Mullins*, 484 U.S. at 157 (stating what Congress could "reasonably have concluded" on the basis of the evidence before it). In this context, the omission of a "disability causation" factual inquiry under the HEW interim provision effectuated the entirely reasonable conclusion of what appears to have been an agency cost/benefit analysis: it was so "highly probable" that totally disabled miners with pneumoconiosis were disabled, at least in part, as a result of their coal mine work, that requiring individual factual determinations of "disability causation" was unjustified in light of (a) the evidence that making such determinations at all was "virtually impossible," (b) the evidence that making

[18] If HEW had adjudicated Mr. Pauley's claim and applied such a policy, it would have awarded him benefits. Besides the medical pneumoconiosis that his x-rays revealed, Mr. Pauley had other respiratory conditions, such as emphysema and chronic bronchitis, as well as non-respiratory conditions, such as arthritis. P. App. 28-35, 37-38.

such determinations would significantly delay the processing of claims, and (c) the fact that Congress had directed the agency to ensure the "prompt and vigorous processing of the large backlog of claims." § 410.490(a).

B. The "Disability Causation" Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act.

1. "Disability Causation" Is Among The "Criteria" That Section 402(f)(2) Encompasses.

If this Court accepts our position that the "disability causation" test in § 727.203(b)(3) is more restrictive than the criteria the HEW interim provision sets forth, *see* § I.A. *supra*, then the statutory question here turns, as it did in *Sebben*, on *which* "criteria" Section 402(f)(2) encompasses. *Sebben*, 488 U.S. at 113-18. Our position is that the "criteria" that Section 402(f)(2) encompasses do include the "disability causation" criterion.

In *Sebben* this Court rejected the Director's contention that the word "criteria" in Section 402(f)(2) did not encompass the "disease causation" criterion at issue there but encompassed only other "medical criteria." *Sebben*, 488 U.S. at 115-18. The Court first referred to the text of Section 402(f)(2) itself, observing that the term "criteria" is "unqualified" both in Section 402(f)(2) and in Section 402(f)(1)(C), whereas in the intervening provision, Section 402(f)(1)(D), the term is qualified. *Id.* at 115-16 and n. 2. The Court concluded that "there is no apparent reason for giving the unqualified word 'criteria' the unnaturally limited meaning the Secretary suggests." *Id.* at 116.[19]

[19] The dissent in *Sebben* agreed with the Secretary and the industry that the word "criteria" in Section 402(f)(2) meant only "medical criteria," basing its view largely on various references in the legislative history to such expressions as "medical criteria" and "medical standards." *Sebben*, 488 U.S. at 134-46 (Stevens, J., dis-

(Footnote continued on following page)

The *Sebben* Court's analysis, emphasizing that Congress chose not to "qualify" the word "criteria" in Section 402(f)(2) in any way, suggests that the word should be broadly interpreted, its breadth being limited only by the particular "criteria" described in the text of Section 402(f)(2) itself: "the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). Such "criteria" encompass all criteria of the HEW interim provision, including its conclusive presumption of "disability causation."

Strongly supporting this broad interpretation of the word "criteria" in Section 402(f)(2) is Congress' "motive" in enacting Section 402(f)(2): "to assure the continued liberality of black lung awards." *Sebben*, 488 U.S. at 116. As we have explained, one important aspect of this outcome that Congress wanted was that Part C claims should be adjudicated under standards as liberal as those applied to Part B claims—*i.e.*, under the standards of the HEW interim provision. *See* pp. 10-12 *supra*. Given this result-oriented "motive," it is difficult to discern here, as it was in *Sebben*, any reason why Congress would have wanted to limit "unnaturally" the ambit of the term "criteria" in Section 402(f)(2) to exclude any criteria that might make a difference in the claims approval rate for Part C claims, *Sebben*, 488 U.S. at 116, including the "disability causation" criterion.

That Congress placed Section 402(f)(2) in Section 402(f), the section defining "total disability," prompted the Secre-

[19] *continued*

senting). However, the dissent did not address the evidence establishing that, because of an eligibility/processing dichotomy in the regulations, such expressions were actually terms-of-art that meant all criteria necessary to establish eligibility, not merely medical criteria. *See* Brief for Charlie Broyles and Lisa Kay Colley in *Sebben* at 21-39 (discussing this and other factors contradicting the conclusion that the "criteria" that Section 402(f)(2) includes are strictly medical criteria).

tary to argue in *Sebben* that the "criteria" in Section 402(f)(2) are limited to the criteria pertaining to "total disability." *Sebben*, 488 U.S. at 114. Significantly, this Court observed in *Sebben* that "total disability," a term-of-art, encompasses "disability causation" as well as "disability severity" criteria. *Id.* ("total disability [is] defined as the inability of the claimant to do his former coal mine work or the equivalent *because of pneumoconiosis*") (emphasis added). The Court's definition of "total disability" is consistent with the statutory definition at Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), and with HEW's and DOL's regulatory definitions at §§ 410.412 and 718.204(b), respectively, in that all four definitions of the term "total disability" expressly subsume the "disability causation" criterion.[20] Thus, the court below, which, like the Secretary in *Sebben*, believed that the word "criteria" in Section 402(f)(2) means "total disability" criteria, P. App. 17, erred in holding that the DOL interim regulation's "disability causation" test at § 727.203(b)(3) is not a "total disability" criterion that Section 402(f)(2) prohibits the Secretary from applying to claims subject to the section. *Id.*[21]

Much as in *Sebben*, this Court need not choose between these two interpretations of the word "criteria" in Section

[20] Indeed, the Director conceded below that HEW's regulatory definition of "total disability, by subsuming "disability causation," effectuates Congress' statutory definition of "total disability." *Dir. 3d Cir. Br.*, n 14 *supra* at 18-19 and n. 8.

[21] The Court below also held that the word "criteria" in Section 402(f)(2) does not include rebuttal criteria at all. P. App. 17. That holding is plainly wrong. Section 402(f)(2) contains not a hint suggesting that whether the word "criteria" in the section encompasses a particular substantive criterion in the HEW interim provision should turn on whether the substantive criterion happens to appear in the invocation, rather than in the rebuttal, subsection of that provision. *See Bean v. Director, O.W.C.P.*, 14 Black Lung Rep. 1-7 (BRB 1989).

402(f)(2)—all criteria addressed in the HEW interim provision, on the one hand, or "total disability" criteria, on the other.[22] For under both interpretations the word "criteria" in Section 402(f)(2) includes the "disability causation" criterion that is more restrictive under the DOL interim regulation than it is under the HEW interim provision.[23] Indeed, the construction of Section 402(f)(2) that the Director made contemporaneously with its enactment

[22] The *Sebben* court found it unnecessary to pass on the Secretary's argument that the word "criteria" in Section 402(f)(2) means "total disability" criteria. *Sebben*, 488 U.S. at 114. The Court, however, did characterize it as having "considerable merit, though . . . by no means [being] free from doubt." *Id.* One important factor substantiating the doubt the Court expressed is that, while Congress placed Section 402(f)(2) in the same *section* of the statute as the provisions defining "total disability," Congress did not place it in the same *subsection*. 30 U.S.C. § 902(f). Indeed, Section 402(f)(2) does not even contain the term "total disability," much less textual language telling the reader that it is defining the term "total disability." 30 U.S.C. § 902(f)(2).

[23] The result would be the same even if the word "criteria" in Section 402(f)(2) could somehow be read—we know not on what basis—to encompass only "disability severity" criteria, a subset of "total disability" criteria. The Court held in *Sebben* that a particular requirement of the DOL interim regulation that "bears *proximately* upon" one criterion violates Section 402(f)(2) of the Act if such requirement "bears *ultimately* upon" some other criterion that the word "criteria" in Section 402(f)(2) encompasses. *Sebben*, 488 U.S.at 114 (emphasis in text). The "disability causation" requirement at § 727.203(b)(3) of the DOL interim regulation "bears ultimately" on the "disability severity" component of the term "total disability." A hypothetical makes the point. Suppose that instead of setting forth the "disability causation" inquiry as a *rebuttal* test, as DOL did in its interim regulation, it had set forth the "disability causation" inquiry as an *invocation* requirement. If DOL had done that, this case would be on all fours with *Sebben*, except that instead of the more restrictive "disease causation" criterion that blocked access to a presumption of eligibility in *Sebben*, 488 U.S. at 114, we would have a more restrictive "disability causation" criterion blocking such access here. As we discussed at n. 21 *supra*, that the "more restrictive" criterion appears at the rebuttal, rather than at the invocation, stage cannot make a difference for purposes of Section 402(f)(2) analysis.

was that the word "criteria" in the section includes "disability causation." § 727.200 (construing the word "criteria" in Section 402(f)(2) to mean "the criteria for determining whether a miner is or was totally disabled . . . *due to* pneumoconiosis") (emphasis added); *see also* § 718.1(b).[24] Consistently, the Director did not argue otherwise below.

2. No Provision of the Act Authorizes The Director To Depart From The Mandate Of Section 402(f)(2).

Rather than challenge Mrs. Pauley's position that the word "criteria" in Section 402(f)(2) encompasses the "disability causation" criterion, the Director argued below that various provisions elsewhere in the Act justified his "departure" from the "[not] . . . more restrictive rule" of Section 402(f)(2) itself. *Dir. 3d Cir. Br.*, n. 14 *supra* at 22-25. And the court below believed that the purpose of the Act set forth in Section 401(a), 30 U.S.C. § 901(a), required the outcome the court reached. P. App. 12-13. Both the Director and the court of appeals were wrong.

a. "All Relevant Evidence." The Director relied heavily in the court of appeals on a passage in the conference committee's report accompanying the 1978 amendments, which stated:

> With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide *more restrictive criteria* than those applicable to a claim filed on June 30, 1973, except that in determining claims *under such criteria all relevant medical evidence* shall be considered.

[24] By adding the "disability causation" test at § 727.203(b)(3), however, the DOL interim regulation at § 727.203—the Director's *implementation* of Section 402(f)(2)—failed to honor his contemporaneous *construction* of Section 402(f)(2) at § 727.200. *See* § I.A *supra*.

H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (emphasis added). The Director suggested that the second sentence of Section 413(b), 30 U.S.C. § 923(b), codified the committee's wish that the Secretary of Labor consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims. *Dir. 3d Cir. Br.*, n. 14 *supra* at 23 n. 11. He argued that to be faithful to the "directive" to consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims, the Secretary of Labor had to include a "disability causation" factual inquiry in the DOL interim regulation because not doing so "would eliminate consideration of a great deal of [medical] evidence relevant to determining whether a miner was totally disabled due to pneumoconiosis," such as medical evidence "about smoking, heart ailments, or respiratory impairments unrelated to coal mine employment." *Id.* at 23.

The Director's reliance on the "all relevant medical evidence" clause in the committee report found support in a Sixth Circuit decision, *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 and n. 3 (6th Cir. 1989). But the argument is without merit, and the Sixth Circuit itself has now questioned that decision. *See Neace v. Director, O.W.C.P.*, 877 F. 2d 495, 496 (6th Cir.), *modifying* 867 F. 2d 264 (6th Cir. 1989).

First, the conference committee's wish that the Secretary of Labor consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims was not codified in the second sentence of Section 413(b) of the Act or in any other provision. Indeed, the latter provision was enacted in 1972, Black Lung Benefits Act of 1972, Pub.L. No. 92-303, § 4(f), 86 Stat. 154 (1972), several years *before* the 1977 conference committee report and the enactment of Section 402(f)(2). Consequently, regardless of what the conference committee wished respecting the consideration of "all relevant medical evidence," its wish never found ex-

pression in the statute itself and so is not one that this Court need or should honor. *See T.V.A. v. Hill*, 437 U.S. 153, 191 (1978).

More importantly, the Director's "all relevant medical evidence" argument simply confuses the committee's reference to "all relevant medical evidence" with its two references to "criteria." The term "criteria" means "standard[s] on which a judgment or decision may be based," the same meaning it has in Section 402(f)(2) of the Act. *Sebben*, 488 U.S. at 113. Accordingly, the passage from the conference report specifies, without qualification, that the Act limits the class of "standards" the Secretary may apply in adjudicating claims to "standards" that are not more restrictive than the "standards" applicable on June 30, 1973. The passage also specifies, again without qualification, that the "evidence" the Secretary is to consider in adjudicating claims "under" the "standards" he has established or will establish in conformity with the Act, must be "all the . . . medical evidence" that is "relevant" to such "standards." Accordingly, the conference report does not express even the committee's wish, much less Congress', that the Secretary be permitted to enlarge the class of "standards" or "criteria" he may apply in adjudicating Section 402(f)(2) claims to include some standards that are more restrictive than the "standards" found in § 410.490 itself. *See* Appendix at 2a, *Peabody Coal Co. v. Taylor*, No. 89-1696 (U.S. petition for cert. filed May 2, 1990) (court of appeals' unpublished order denying rehearing).

The conference committee directed the Secretary of Labor to consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims in an effort to prevent DOL adjudicators from approving claims upon invocation of the presumption without even considering the evidence pertinent to the rebuttal standards, as some apparently thought the HEW adjudicators had done. *Mullins*, 484

U.S. at 149-50. Neither the committee's direction nor Section 413(b) of the Act authorized the Director to apply the "disability causation" test at § 727.203(b)(3) or any other criteria that Section 402(f)(2) prohibits him from applying.

b. The "General Statutory Scheme." The Director also argued below that he is justified in disregarding Section 402(f)(2)'s mandate because not applying a "disability causation" rebuttal test would "depart from the general statutory scheme." *Dir. 3d Cir. Br.*, n. 14 *supra* at 24-25. This scheme, according to the Director, is one in which the elements of a claim that the statutory presumptions in Section 411(c), 30 U.S.C. § 921(c), presume are, with one exception, always rebuttable. *Dir. 3d Cir. Br.*, n. 14 *supra* at 24.

The "general scheme" that the Director posits does not exist. As he acknowledges, *id.* at 24 and n. 12, Section 411(c)(3)'s presumption that a miner's impairments are "severe" enough to be "totally disabling" is irrebuttable. Similarly, Section 411(c)(5) permits only partial rebuttal of the presumed element of "disability severity." And § 718.306, the Secretary's regulatory implementation of the Section 411(c)(5) statutory presumption, entirely disallows rebuttal of the presumption of "disability causation." § 718.306(c).

The Director's "general scheme" argument is therefore properly understood as a contention that Section 402(f)(2) should be read to prohibit the Secretary of Labor from applying presumptions to Section 402(f)(2) claims that differ in any respects from the presumptions in Section 411(c). But HEW's and DOL's sets of *permanent* regulations at 20 C.F.R. Parts 410 and 718, respectively, independently implement all five of the presumptions codified at Section 411(c) of the Act. §§ 410.416(a), 410.456(a), 718.203(b) (implementing Section 411(c)(1)); §§ 410.462(a),

718.303(a) (implementing Section 411(c)(2)); §§ 410.418, 410.458, 718.304 (implementing Section 411(c)(3)); §§ 410.414 (b)(1)-(3), 410.454(b)(1)-(3), 718.305(a) (implementing Section 411(c)(4)); §§ 410.702(g), 718.306(a)-(c) (implementing Section 411(c)(5)). And the Director must, in any event, apply these and all other permanent regulations to claims that do not succeed under the interim provisions. §§ 410.490(e), 727.203(c), (d). Accordingly, the Director's "general scheme" argument imposes a reading on Section 402(f)(2) that would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2): to ensure that the claims to be adjudicated under that provision would *not* be relegated solely to the strict permanent regulations but would first be adjudicated under standards no more restrictive than the much more liberal HEW interim provision. *See Sebben*, 488 U.S. at 117.

c. The "Purpose" of The Benefits Act and "Justice." In rejecting our contention that the DOL "disability causation" rebuttal test at § 727.203(b)(3) violated Section 402(f)(2), the court of appeals relied principally on the "purpose of the Benefits Act" as set forth in Section 401(a). P. App. 12-13. The court described this purpose as "provid[ing] a recovery for a miner totally disabled at least in part by pneumoconiosis *if the disability arises out of coal mine employment.*" *Id.* at 12. The court then concluded that "it seems perfectly evident that . . . [no] claimant who [does not show or allow his opponent to disprove that his disability arose in part out of coal mine employment] may nevertheless recover." *Id.* at 13. That conclusion in turn was, as the court stated, "outcome determinative" of its alternative holdings, *id.* at 12, which, as we have explained, are incorrect on their own terms. *See* pp. 23-30 and 31-32 and n. 21 *supra*.

The court's view of the purpose of the Act and the decisive ("outcome determinative") force the court gave that

view were erroneous for four reasons. First, part of the court of appeals' "outcome determinative" answer was that every "set of *regulations*" must conform to the statutory "disability causation" requirement that, in the court's view, Section 401(a) imposes. P. App. 13 (emphasis added). That answer obviously assumed that the HEW interim provision, on which we relied in urging the court to forbid the Director from applying the "disability causation" rebuttal test at § 727.203(b)(3), is merely a regulation. However, Congress elevated the HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the *statutory* standard of restrictiveness for the "criteria" the Secretary of Labor could apply. *Sebben*, 488 U.S. at 113-16. Accordingly, the actual question before the court of appeals was, as it is here, whether the rebuttal test at § 727.203(b)(3) of the DOL interim regulation is consistent with Section 402(f)(2) (*i.e.*, the HEW interim provision *as a statute)*, not, as the court of appeals thought, whether the HEW interim provision *as a regulation* is consistent with the statutory "purpose" provision at Section 401(a).

Second, the court of appeals arrived at its "outcome determinative" answer to Mr. Pauley's claim without ever having scrutinized the text of Section 402(f)(2), the statutory provision on which the claim is based, and by misreading the plain language of Section 401(a), the statutory provision at which it did look. *See* P. App. 12-13. Section 402(f)(2)'s "not . . . more restrictive" mandate is an operative requirement that supports our position, *see* § I.B.1 *supra*, whereas Section 401(a) sets forth no operative requirements at all, much less any "disability causation" requirement. Rather, Section 401(a) is merely the type of precatory "purpose" provision typically found in federal benefits and grant-in-aid statutes. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18-27 (1981).

Third, the disharmony the court of appeals believed the stated purpose of the Act in Section 401(a) has with Section 402(f)(2), as we read it, does not exist. If Section 401(a) establishes a benefits program the purpose of which makes "disability causation" an eligibility requirement, then Section 402(f)(2), as it incorporates the HEW interim provision, does just that. The court of appeals confused the absence of a "disability causation" *factual inquiry* with the absence of a "disability causation" *eligibility requirement*. Like Section 401(a), as the court read it, Section 402(f)(2), through the HEW interim provision, includes a "disability causation" *eligibility requirement*: a claimant who successfully invokes "will be presumed to be totally disabled *due to pneumoconiosis*." § 410.490(b) (emphasis added). The "disability causation" requirement is satisfied conclusively by proving other significant facts that invoke the HEW interim presumption, but it is an eligibility requirement nonetheless.[25]

[25] Nothing in Section 401(a) or any other provision of the Act suggests that Congress meant to prohibit HEW from issuing regulations, like its interim provision, that permitted a miner to meet an element of his claim (*e.g.*, "disability causation") by means of a conclusive presumption invoked by proof of other significant facts. To the contrary, Sections 402(f) and 411(b) of the Act, 30 U.S.C. §§ 902(f), 921(b), gave HEW legislative authority to write regulations governing the eligibility standards for Part B claims. 30 U.S.C. § 902(f) (1970 & Supp. II 1972) ("The term 'total disability' has the meaning given to it by regulations of the Secretary of Health, Education and Welfare . . ."); 30 U.S.C. § 921(b) (1970 & Supp. II 1972) ("The Secretary [of HEW] shall by regulation prescribe standards for determining . . . whether a miner is totally disabled due to pneumoconiosis. . . ."); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). Confirming HEW's authority to permit a miner to establish his eligibility by invoking a conclusive presumption of an element of a claim is that Section 411(d), 30 U.S.C. § 921(d), provides that the breadth of HEW's rulemaking authority was in no way limited by the five presumptions set forth in Section 411(c), including the conclusive presumption at Section 411(c)(3) applicable in "complicated" pneumoconiosis cases. Accord-

(Footnote continued on following page)

Fourth, the court of appeals' reliance on the "purpose of the . . . Act," P. App. 12, was in error because it simply overlooked the fact that Section 402(f)(2) was compromise legislation that resolved a legislative struggle between coal miners and the industry. *See Sebben*, 488 U.S. at 140 (Stevens, J., dissenting); pp. 10-12 *supra*.[26] This oversight was significant because Bethenergy's plea in this case is ultimately bottomed on a request that this Court give it a favorable result that, as we have shown, Congress declined to give it in the statute itself when codifying the compromise that was forged.

This Court, however, is not in the business of extending judicial favors to legislative combatants that, like the industry here, claim dissatisfaction with the results of leg-

[25] *continued*
ingly, any regulations HEW issued in 1972 "to prescribe [eligibility] standards" for "total disability" were lawful unless they were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The HEW interim provision was none of these things. In particular, its conclusive presumption of "disability causation" is properly understood as the product of a reasonable agency cost/benefit analysis that was responsive to Congress' express wishes. *See* pp. 29-30 *supra*.

[26] Although the compromise gave something to both coal miners and the coal industry, the industry appears to have gotten the better of the legislative bargain. Under the Part 718 regulations, which is what the industry won, the overall denial rate has been an astonishing 91.4%, and the denial rate since January 1, 1982 has been 93.5%. 1988 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 26 (1990) [hereinafter *1988 Annual Report*]. In contrast, the adjudications under the liberal standards that Section 402(f)(2) mandated, which is what the union won, have resulted in only a 42.9% approval rate, *id.*, below the rate the Senate Labor and Public Welfare Committee considered unsatisfactory in 1972. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Moreover, these adjudications under the liberal Section 402(f)(2) standards are virtually at an end, while adjudications under the strict Part 718 regulations will continue indefinitely. *1988 Annual Report*, *supra* at 26.

islative compromises that statutory texts embody. The primacy of the legal text in construing the meaning of statutes and the respect this Court shows for congressional compromises resolving legislative struggles between or among competing factions forbid such gratuities. *See, e.g., Sebben*, 488 U.S. at 118 ("[W]e . . . sit . . . to apply what Congress enacted. . . ."); *T.V.A. v. Hill*, 437 U.S. 153, 191 (1978) (declining to give effect to unambiguous intent of congressional committees when substantive statute forbade result committees wanted); *Local No. 82, Furniture & Piano Moving Drivers v. Crowley*, 467 U.S. 526, 542, 538-46 (1984) (rejecting contention that provision referring to "already conducted" elections in federal labor statute that "[like] much federal labor legislation . . . was 'the product of conflict and compromise,' " should be read not to denote elections that have been conducted but in which ballots have not been tabulated and certified); *Aluminum Co. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 383, 390-93 (1984) (rejecting argument by public utilities that provision referring to "amount of power" in federal legislation passed to resolve "consumer struggle" among utilities and others for cheap power should be read also to refer to the "interruptability" of power).

These principles apply even when, unlike here, the express dictates of the text do not square with the ultimate stated "purpose" of the legislation of which the compromise provision is part. *Board of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective

must be the law") (emphasis omitted); *see Crowley*, 467 U.S. at 538-46; *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984).[27]

The court of appeals also erred in concluding that benefits awards to miners who were, "on the . . . facts," not disabled due to pneumoconiosis would be "unjust." P. App. 14. It is not "unjust" to honor Congressional compromises. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). The industry has already capitalized heavily on what it won under the compromise. *See* n. 26 *supra*. "Justice" demands that, in return for these gains, it pay the compromise price that Congress set.

3. No "Clearly Expressed Legislative Intention" Contrary To The Statutory Language Justifies Any Departure From The Mandate Of Section 402(f)(2).

There is a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987). That presumption weighs in the black lung claimant's favor here. *See* § I.B.1 *supra*. To overcome it, the Secretary and the industry must show that the meaning the claimants ascribe to the text would lead to an absurd, or at least a highly unusual, result that "other evidence of congressional intent," principally the legislative history, clearly shows that

---

[27] Indeed, that the 1978 amendments that added the Section 402(f)(2) compromise provision should even be evaluated in terms of what Congress' "purpose" might or must have been when it passed the Act nine years earlier is, at bottom, illogical. Statutory amendments, especially ones effectuating compromises between or among competing constituencies, have their own purposes, as this Court recognized in *Sebben* with respect to Section 402(f)(2) itself. *Sebben*, 488 U.S. at 116 ("It seems likely that Congress had no particular motive in preserving the HEW interim medical criteria [when it enacted Section 402(f)(2)] other than to assure the continued liberality of black lung awards.").

Congress could not have wanted. *Public Citizen v. U.S. Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989). *Accord INS v. Cardoza-Fonseca*, 480 U.S. at 432 n. 12 (1987).

There is nothing absurd or unusual about awarding black lung benefits in claims like Mr. Pauley's. To the contrary, that the HEW interim provision allowed benefits awards to claimants without a "disability causation" inquiry appears to be the product of an eminently reasonable agency determination that, in light of all the circumstances, the costs of applying a "disability causation" test were too great to allow such a test to be imposed. *See* pp. 29-30 *supra*. Similarly, that Section 402(f)(2), as we read it, forbids a "disability causation" test in the DOL interim regulation is the outcome of a congressional compromise of the type that is usual in the legislative process.

Moreover, far from revealing any intention contrary to the text of the Act, the legislative history affirmatively supports our position. We have found nothing in the legislative history even suggesting, much less "clearly express[ing]," *Cardoza-Fonseca*, 482 U.S. at 432 n. 12, that Congress wanted to allow the Director to supplement the HEW interim provision with a "disability causation" factual inquiry.[28] In contrast, the legislative history clearly

[28] To be sure, a review of the legislative history reveals a decided silence with respect to whether members of Congress were aware or not that the HEW interim provision lacks a "disability causation" test. No legislator spoke to his or her precise understanding of the interstices of the HEW interim provision. However, the inference that most, if not all, legislators were simply unaware of the specific terms of the HEW interim provision, or of the way it had been applied, is impermissible, as this Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp.*, 486 U.S. at 184-85. The force of that presumption is especially strong where, as with Section 402(f)(2) and the HEW interim provision, the terms of the particular legislation that Congress

(Footnote continued on following page)

establishes that the outcome Congress wanted in enacting Section 402(f)(2) was to bring the Part C standards into parity with the Part B standards. *See* pp. 10-12 *supra*. Congress could not have achieved that outcome if it had authorized the Secretary of Labor to supplement the HEW interim provision with a "disability causation" factual inquiry, which would have operated to the detriment of claimants.

C. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision.

With respect to claims adjudicated under Part C of the Act, black lung benefits are paid either by individual coal operators or by the federal Black Lung Disability Trust Fund. 30 U.S.C. §§ 932(b), 932(c), 932(j) (incorporating 26 U.S.C. §§ 9501(d)(1)(B), (d)(2), (d)(7)).[29] The Trust Fund is exclusively liable for the payment of black lung benefits in only three categories of claims, among which are those where "there is no operator who is liable for the payment of such benefits." 26 U.S.C. §§ 9501(d)(1)(B), (d)(2), (d)(7); 30 U.S.C. § 932(j)(1) (incorporating 26 U.S.C. § 9501(d)(1)). Such claims are identified under Section 422(c) of the Act, 30 U.S.C. § 932(c), which allows a coal operator to avoid indi-

[28] *continued*
enacts suggest that "Congress clearly had to focus on the terms of" the existing law. *Aluminum Co.*, 467 U.S. at 392 and n. 8. The inference that this Court's decisions requires is therefore that when Congress enacted Section 402(f)(2), it *was* aware that the HEW interim provision did *not* include a "disability causation" provision.

[29] The Trust Fund is funded by taxes collected from coal producers on the amount of coal they produce, 26 U.S.C. § 4121, and is administered by the Secretaries of the Treasury, of Labor, and of Health and Human Services, as trustees. 26 U.S.C. § 9501(a)(2).

vidual liability to a claimant found eligible for benefits if the operator is able to prove, *inter alia*, that the miner's disability "did not arise, at least in part, out of employment in a mine . . . *when it was operated by such operator.*" 30 U.S.C. § 932(c) (emphasis added). Thus, Section 422(c) allows a "disability causation" factual inquiry that is more favorable to an operator than the "disability causation" rebuttal test at § 727.203(b)(3) would be.

The function of Section 422(c), however, is not to determine whether a claimant is or is not eligible for benefits. Its function is solely to determine whether the benefits to a miner already found eligible for them—here, under Section 402(f)(2) of the Act and the HEW interim provision—are to be paid by an individual coal operator or instead by the Trust Fund. *See* §§ 725.492(a)(1), 725.493(a)(6) (both implementing Section 422(c)). Section 422(c) and its implementing regulations at Part 725 of 20 C.F.R. are merely "processing," not "eligibility," provisions. 43 Fed. Reg. 36825 (1978) ("[T]he *procedures* contained in Part 725 of this subchapter and not those contained in this part [Part 727] are applicable to the *processing* of [certain] claims. Only the medical criteria for determining *eligibility* with respect to such claims are contained in this part.") (emphasis added). Thus, Section 422(c) allows individual operators only to *avoid* liability; application of the section *cannot defeat* the claim of a miner who establishes his entitlement to benefits under Section 402(f)(2) of the Act, which incorporates the HEW interim provision. If an individual operator is able to avoid liability by meeting the "disability causation" proof that Section 422(c) affords, then the Trust Fund is liable for the benefits to which the miner is entitled. 30 U.S.C. § 932(j)(1) (incorporating 26 U.S.C. § 9501(d)(1)(B)).[30]

[30] In *Usery*, the entire Court agreed that individual operators can avoid liability for benefits by making the "disability causation"

(Footnote continued on following page)

II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the brief in opposition it filed in this Court, Bethenergy argued that construing Section 402(f)(2) to invalidate the DOL "disability causation" rebuttal test at § 727.203(b)(3) would violate its rights under the due process clause of the fifth amendment to the United States Constitution, U.S. CONST. amend. V. Br. In Opp. at 14-16. Bethenergy maintained that due process guarantees require a statutory scheme under which Bethenergy was afforded an opportunity to prove that John Pauley's disability did not arise out of his coal mine employment. *Id.*

While Bethenergy vigorously pressed the Section 402(f)(2) constitutional issue in its brief in opposition, it did not even raise the issue in the court below. Whether the issue has been properly preserved is therefore questionable, even though we presented it in our petition to this Court. *See Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958).[31]

[30] *continued*
proof that Section 422(c) affords them. 428 U.S. at 35-37; *id.* at 51 (Stewart, J. concurring in part). At the time *Usery* was decided, unlike now, an operator who successfully avoided liability under Section 422(c) also defeated the claim entirely because the Trust Fund did not yet exist. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978) (creating the Trust Fund).

[31] The Director contended below that the court should interpret Section 402(f)(2) to permit the Secretary to apply each of the DOL rebuttal provisions so as to avoid "raising the specter of constitutional violations." *Dir. 3d Cir. Br.*, n. 14 *supra* at 28. But the Director took no position as to whether, if the constitutionality of Section 402(f)(2) were considered, it should be held unconstitutional. Accordingly, the Director, like Bethenergy, failed to raise the Section 402(f)(2) constitutional question in the court of appeals. In any event, the Director clearly has no standing to make any

(Footnote continued on following page)

In any event, Section 402(f)(2), as we urge the Court to construe it, does not violate the due process rights of coal operators. First, Section 422(c) of the Act, which we discussed in § I.C *supra*, completely answers Bethenergy's constitutional challenge. By affording every coal operator the opportunity to avoid liability by proving, *inter alia*, that the miner's disability did not arise, in whole or in part, out of employment in the operator's own mines, Section 422(c) affords operators the very opportunity that—indeed, a broader opportunity than the one that—Bethenergy incorrectly says is unconstitutionally absent from the statutory scheme.

Moreover, Section 402(f)(2) would be constitutional even if the Act lacked a provision like Section 422(c). In *Usery*, coal operators pursued several constitutional challenges similar to the one Bethenergy presses here. *Usery*, 428 U.S. at 20-31. One of the challenges was to what the Court referred to as "§ 411(c)(3)'s '*irrebuttable presumption*' of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis." *Id.* at 22 (emphasis added). Making short shift of this challenge, the Court analyzed the presumption in terms of its "operation and effect," *Id.* at 24, which was "that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines. . . ." *Id.*

---

[31] *continued*
due process challenge to the provision. *Dayton v. Consolidation Coal Co.*, 895 F. 2d, 173, 175-76 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3725 (U.S. October 29, 1990) (No. 90-114).

Judge Posner and the late Judge Friendly have sharply criticized the canon that courts should construe statutes to avoid constitutional doubts about their validity. R. Posner, *The Federal Courts* 285 (1987); H. Friendly, *Benchmarks* 210-12 (1967). As we explain in the text, however, that Section 402(f)(2) is constitutionally valid is free from doubt. Accordingly, the canon has no play here.

at 23. Because the Act "regulat[es] purely economic matters," *id.* at 23-24, the constitutional question was simply whether this congressionally dictated outcome was "irrational." *Id.* at 23. The Court concluded that it was not. *Id.* at 23-24.

Even if Section 422(c) did not exist, *Usery* would doom Bethenergy's constitutional argument. In x-ray cases the "operation and effect" of Section 402(f)(2), if construed to invalidate the "disability causation" rebuttal test at § 727.203(b)(3), is to afford benefits to miners (1) who have medical pneumoconiosis *and* (2) whose medical pneumoconiosis arises out of their coal mine employment (or who mined at least 10 years) *and* (3) who are totally disabled from performing their usual coal mine work or comparable work *and* (4) for whom it is "highly probable," though not certain, that their total disability arises, at least in part, out of their coal mine employment. *See* n. 12 and pp. 29-30 *supra*. This "operation and effect" of Section 402(f)(2) is not irrational, *see, e.g., Weinberger v. Salfi*, 422 U.S. 749, 781-85 (1975), and could hardly be irrational when the precursor of Section 402(f)(2)—the HEW interim provision—is properly viewed as the product of a reasonable agency cost/benefit analysis that was responsive to Congress' express wishes. *See* pp. 29-30 *supra*. Therefore, whether a claimant "merits compensation" under such circumstances "is a public policy matter left primarily to the determination of the legislature." *Usery*, 428 U.S. at 21.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed and the case remanded with directions to award Mrs. Pauley black lung benefits.

Respectfully submitted,

TIMOTHY P. CREANY
BLAIR V. PAWLOWSKI
(Counsel of Record)
603 North Julian Street
P.O. Box 658
Ebensburg, Pennsylvania 15931
(814) 472-7046

JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER
LEGAL ASSISTANCE FOUNDATION
OF CHICAGO
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Petitioner
Harriet Pauley (No. 89-1714)

APPENDIX

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

TABLE OF CONTENTS (APPENDIX)

	App. Page
U.S. CONST. amend. V	1
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988):	
§ 401(a), 30 U.S.C. § 901(a)	1
§ 402(f), 30 U.S.C. § 902(f)	2
§ 422(c), 30 U.S.C. § 932(c)	3
§ 422(j), 30 U.S.C. § 932(j)	4
26 U.S.C. § 9501(d)(1) (1988)	4
20 C.F.R. § 410.490	5
20 C.F.R. § 727.203	8
20 C.F.R. § 410.412	10
Coal Miner's Benefits, Manual (Part IV):	
§ IB6(e)	11
§ IB9(g)(1), (2)	12

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988)

Congressional findings and declaration of purpose;

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988)

(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988)

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

Section 422(j) of the Black Lung Benefits Act, 30 U.S.C. § 932(j) (1988)

(j) Failure of operators to secure benefits

Notwithstanding the provisions of this section, section 9501 of Title 26 shall govern the payment of benefits in cases—

(1) described in section 9501(d)(1) of Title 26;

(2) in which the miner's last coal mine employment was before January 1, 1970; or

(3) in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 945 of this title.

26 U.S.C. § 9501(d)(1) (1988)

Expenditures from trust fund.—Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for—

(1) the payment of benefits under section 422 of the Black Lung Benefits Act in any case in which the Secretary of Labor determines that—

(A) the operator liable for the payment of such benefits—

(i) has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary of Labor, or

(ii) has not made a payment within 30 days after that payment is due,

except that, in the case of a claim filed on or after the date of the enactment of the Black Lung Benefits Revenue Act of 1981, amounts will be available under this subparagraph only

for benefits accruing after the date of such initial determination, or

(B) there is no operator who is liable for the payment of such benefits.

20 C.F.R. § 410.490

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconio[illegible] the time of his death, or his death will be presur[illegible]e to pneumoconiosis, as the case may be.

(1) One of t[illegible]al requirements is met:

(i) A chest ro[illegible]n. [illegible]-ray), biopsy, or autopsy establishes the exi[illegible]ce of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence

shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

20 C.F.R. § 410.412

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 420.424 through 410.426); and

(2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of his death:

(1) His pneumoconiosis prevented him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424 through 410.426); and

(2) His impairment was expected to result in his death, or it lasted or was expected to last for a continuous period of not less than 12 months.

Coal Miner's Benefits Manual (Part IV), § IB6(e)

Cross refer subsection IB6(e) of TI #21 to subsection IB9(g)(1) of TI #21.

(e) *Rebuttal of Interim Presumption.*—A finding of total disability under the interim medical criteria set forth above may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work, *or*

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establishes that the individual is, in fact, able to do his usual coal mine work or comparable and gainful work, *or*

(3) Biopsy or autopsy findings clearly establish that no pneumoconiosis exists (see C.2.).

Coal Miner's Benefits Manual (Part IV), § IB9(g)(1), (2)

(g) *Work Activity*

(1) *The Effect of Work Activity on Entitlement.*—While noncomparable work activity would generally not have a direct rebutting impact on the black lung decision, all recent or continuing work activity must be considered in evaluating the case. The weighing of the fundamental capacity demonstrated by recent work of any kind, especially heavy work, may be particularly critical in cases where a decision has to be made since it may raise a question about the individual's functional capacity.

In addition to the foregoing, continuing performance of coal mine or comparable and gainful work on or after the date of application through the date of adjudication will rebut a finding of disability (except in the special case where complicated pneumoconiosis exists). If such work is recent, but has stopped because of disability due to pneumoconiosis before the date of adjudication and a finding of total disability is otherwise indicated, onset of disability can be established as of the first day of the month in which the miner meets all of the requirements of entitlement, including the absence of demonstrated ability to perform coal mine or comparable and gainful work.

On the other hand, if a miner returned to coal mine or comparable and gainful work or any type of heavy work within 12 months of his application date, this may raise a serious question as to whether the durational requirement of the law (see IB2(c)) is met. Such cases should be referred to DDPP, MBB, Room T-7154.

As indicated above, although the functional capacities demonstrated by gainful noncomparable work must be considered in reaching the black lung decision, such work in itself would ordinarily not bar entitlement. However, the miner would be subject to reductions on account of excess earnings (MBM 530).

A special exception to the general rules on noncomparable work is the continuing performance of heavy work. This in itself is evidence that the miner has the physical capacity for doing work involving the whole range of physical requirements from sedentary to heavy. This would be equivalent to the evidence produced by exercise testing. Accordingly, total disability would be rebutted, unless the miner has complicated pneumoconiosis. In other words, such work would be treated in the same way as gainful coal mine or comparable work.

(2) *Comparable and Gainful Work.*—This section deals with the issue of whether the recent or continuing non-coal mine employment of the miner is both comparable to his usual coal mine employment and gainful.

A miner working in non-coal mine employment would ordinarily not be found to be engaging in comparable and gainful work activity under the following circumstances:

- Actual earnings are below the SGA level
- Regardless of earnings, the work activity is not comparable in terms of skills and abilities to those of his usual mine work activity.

Where earnings from non-coal mine work are at the "gainful employment" level, the determination as to whether such work is also "comparable" requires an assessment of all the facts concerning the work activity.

* * *

Nos. 89-1714, 90-113 and 90-114

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

---

JOINT BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Of Counsel:
JOHN J. BAGNATO
SPENCER, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 775-7154

* *Counsel of Record for the Clinchfield Coal Company*

** *Counsel of Record for the Consolidation Coal Company*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

These consolidated appeals seek this Court's resolution of two questions deferred in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

1. Does 30 U.S.C. § 902(f)(2) invalidate Department of Labor regulations allowing a coal mine operator to defend the black lung disability benefit claims of certain former coal miners on the grounds that the miners do not have black lung disease or any related disability.

2. If 30 U.S.C. § 902(f)(2) invalidates Department of Labor regulations affording mine operators a full and fair opportunity to defend black lung benefit claims, is 30 U.S.C. § 902(f)(2) itself invalid under the Due Process Clause of the Fifth Amendment to the Constitution of the United States because it requires mine operators to pay benefits to certain black lung claimants absent any valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John A. Taylor ("Taylor") is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the court of appeals and is a respondent here. The Clinchfield Coal Company ("Clinchfield") is the mine owner that last employed Taylor. Clinchfield was the respondent in the court of appeals and is the petitioner in this Court.

Albert C. Dayton ("Dayton") is also a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the court of appeals and is a respondent here. The Consolidation Coal Company ("Consol") is the mine owner that last employed Dayton. Consol was the respondent in the court of appeals and is the petitioner here.

The Director, Office of Workers' Compensation Programs, is the employee of the United States Department of Labor ("DOL" or "Labor") assigned general responsibility by the Secretary of Labor for the administration of the federal black lung benefits program. The Director, by delegation, is a statutory party in interest in black lung claims. 30 U.S.C. § 932(k). The Director was a respondent in the court of appeals, and is a respondent in this Court, in both cases.

Clinchfield is a wholly-owned subsidiary of the Pittston Companies. Consol is a wholly-owned subsidiary of E.I. du Pont de Nemours & Company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Introduction	3
B. Background of the Black Lung Benefits Program	6
C. Origins of the Interim Presumption	9
D. A Comparison of the Presumptions	14
1. Invocation	14
2. Rebuttal	16
E. John Taylor's Case	19
F. Albert Dayton's Case	20
SUMMARY OF ARGUMENT	22
ARGUMENT	24
I. DOL'S INTERIM CRITERIA ARE NOT MORE RESTRICTIVE THAN SSA'S WITH RESPECT TO BLOOD GAS STUDIES OR REBUTTAL GENERALLY	24
A. DOL's Third and Fourth Rebuttal Rules Are Not Invalidated Generally By 30 U.S.C. § 902(f)(2)	24
B. DOL's Blood Gas Presumption Does Not Violate Section 902(f)(2)	32
II. THE BLACK LUNG BENEFITS ACT PROHIBITS DOL FROM MANDATING AN AWARD WHERE IT IS PROVEN THAT THE MINER DOES NOT HAVE PNEUMOCONIOSIS OR ANY RELATED DISABILITY	33

III. DOL'S REBUTTAL RULES DESERVE JUDICIAL DEFERENCE 40

IV. 30 U.S.C. § 902(f)(2) VIOLATES THE DUE PROCESS RIGHTS OF MINE OPERATORS IF IT COMPELS LIABILITY FOR DISABILITY OR DEATH IN WHICH THE MINE OPERATOR IS NOT INVOLVED 42

CONCLUSION 47

TABLE OF AUTHORITIES

CASES: Page

Amax Coal Co. v. Burns, 855 F.2d 499 (7th Cir. 1988) 18

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 39

BethEnergy Mines Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989), *cert. granted sub nom. Pauley v. BethEnergy Mines Inc.*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 89-1714) 6

Bethlehem Mines Corp. v. Massey, 736 F.2d 120 (4th Cir. 1984) 18

Broyles v. Director, Office of Workers' Compensation Programs, 824 F.2d 327 (4th Cir. 1987), *aff'd in part sub. nom. Pittston Coal Group*, 488 U.S. 105 (1988) 4,6

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1987) 41

County Court of Ulster Cty. v. Allen, 442 U.S. 140 (1979) 43

Dole v. United Steelworkers' of America, 110 S. Ct. 929 (1990) 34

Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975) 31

Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983) 31

Knudtson v. Benefits Review Board, 782 F.2d 97 (7th Cir. 1986) 18

Long v. Itmann Coal Co., No. 84-1865, 838 F.2d 466 (4th Cir. May 19, 1987) 18

Massachusetts v. Morash, 109 S. Ct. 1668 (1989) . 34,35

Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 84 (1990) 18

Table of Authorities Continued

	Page
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910)	43
Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs, 461 U.S. 624 (1983)	38
Morton v. Mancari, 417 U.S. 535 (1974)	36
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	*passim*
Mutter v. Weinberger, 391 F. Supp. 951 (W.D. Va. 1975)	17
Oliver v. Califano, 476 F. Supp. 12 (D. Utah 1979)	17
Orange v. Island Creek Coal Co., 786 F.2d 724 (6th Cir. 1986)	18
Pavesi v. Director, Office of Workers' Compensation Programs, 758 F.2d 956 (3d Cir. 1985)	28
Peabody Coal Co. v. Holskey, 888 F.2d 440 (6th Cir. 1989)	18
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	34
Pittston Coal Group v. Sebben, 488 U.S. 105 (1988)	*passim*
Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 499 U.S. 268 (1980)	38
Ramey v. Kentland Elkhorn Coal Co., 755 F.2d 485 (6th Cir. 1985)	18
Republic Steel Corp. v. United States Dep't of Labor, 590 F.2d 22 (3d Cir. 1978)	8
Robinette v. Director, Office of Workers' Compensation Programs, 902 F.2d 1566 (4th Cir. Apr. 27, 1990), *petition for cert. filed*, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172)	20

Table of Authorities Continued

	Page
Soloe v. Director, Office of Workers' Compensation Programs, 10 Black Lung Rep. (MB) 1-125 (Ben. Rev. Bd. 1987)	28
Strike v. Director, Office of Workers' Compensation Programs, 817 F.2d 395 (7th Cir. 1987)	9
Taft v. Alabama By-Products, 733 F.2d 1518 (11th Cir. 1988)	18
Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696)	5,6
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	9,27,43,44
Warth v. Seldin, 422 U.S. 490 (1975)	42
Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989)	5
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. V	3,43,45,46
STATUTES AND REGULATIONS:	
Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988)	
Section 5, 5 U.S.C. § 554 (1988)	7
26 U.S.C. § 4121 (1988)	8
26 U.S.C. § 9501(c) (1988)	8
26 U.S.C. § 9501(d) (1988)	8
26 U.S.C. § 9501(d)(5) (1988)	8
28 U.S.C. § 1254(1) (1988)	3
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988)	
Section 401(a), 30 U.S.C. § 901(a) (1988)	3,7,34,35
Section 402(b), 30 U.S.C. § 902(b) (1988)	18,25

Table of Authorities Continued

	Page
Section 402(f), 30 U.S.C. § 902(f) (1988)	3,7,30,34,35
Section 402(f)(1), 30 U.S.C. § 902(f)(1) (1988)	34,40
Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A) (1988)	35,41
Section 402(f)(1)(B), 30 U.S.C. § 902(f)(1)(B) (1988)	35
Section 402(f)(1)(D), 30 U.S.C. § 902(f)(1)(D) (1988)	35
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988)	*passim*
Sections 411-415, 30 U.S.C. §§ 921-925 (1988)	7
Section 411(a), 30 U.S.C. § 921(a) (1988)	35
Section 411(c)(3), 30 U.S.C. § 921(c)(3) (1988)	44
Section 412, 30 U.S.C. § 922 (1988)	36
Section 412(b), 30 U.S.C. § 922(b) (1988)	8
Section 413(b), 30 U.S.C. § 923(b) (1988)	3,7,24,37,41
Sections 421-435, 30 U.S.C. §§ 931-945 (1988)	7
Section 421, 30 U.S.C. § 931 (1988)	7,36
Section 421(b)(2)(A), 30 U.S.C. § 931(b)(2)(A) (1988)	36
Section 422, 30 U.S.C. § 932 (1988)	7,8,36
Section 422(b), 30 U.S.C. § 932(b) (1988)	40
Section 422(a), 30 U.S.C. § 932(a) (1988)	3,7
Section 422(c), 30 U.S.C. § 932(c) (1988)	3,8,24,36,41
Section 422(j), 30 U.S.C. § 932(j) (1988)	8

Table of Authorities Continued

	Page
Section 422(k), 30 U.S.C. § 932(k) (1988)	ii,42
Section 423, 30 U.S.C. § 933 (1988)	8
Section 424, 30 U.S.C. § 934 (1988)	8
Section 424a, 30 U.S.C. § 934a (1988)	8
Section 426, 30 U.S.C. § 936 (1988)	7
Section 426(a), 30 U.S.C. § 936(a) (1988)	40
Section 430, 30 U.S.C. § 940 (1988)	37
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978)	7
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972)	7,9,29
Longshore Act, as amended, 33 U.S.C. §§ 901-950 (1988)	
Section 19(d), 33 U.S.C. § 919(d) (1988)	7
Section 21(b), 33 U.S.C. § 921(b) (1988)	7
Section 21(c), 33 U.S.C. § 921(c) (1988)	3,7
42 U.S.C. § 405 (1988)	7
42 U.S.C. § 424a(2)(A) (1988)	8
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)	7
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312, 313 (1986)	7
Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981)	7
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978)	7
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, as amended	6,9
Rules of the U.S. Supreme Court, Rule 29.1	ii

Table of Authorities Continued

Page

Black Lung Program Regulations

20 C.F.R. Part 410, subpart D, App. (1990) 15,23,32
20 C.F.R. §§ 410.401-410.476 (1990) 10,31
20 C.F.R. § 410.412 (1990) 29
20 C.F.R. § 410.412(a)(1) (1990) 17,23,29,30
20 C.F.R. § 410.416 (1990) 16,20,25,26
20 C.F.R. § 410.416(a) (1990) 16,26,27
20 C.F.R. § 410.416(b) (1990) 16,26
20 C.F.R. §§ 410.424-410.426 (1990) 17,30
20 C.F.R. § 410.424 (1990) 17
20 C.F.R. § 410.424(a) (1990) 32
20 C.F.R. § 410.426 (1990) 17
20 C.F.R. § 410.426(a) (1990) 23,30
20 C.F.R. § 410.456 (1990) 16,25,26
20 C.F.R. § 410.456(a) (1990) 16,26,27
20 C.F.R. § 410.456 (b) (1990) 16,26
20 C.F.R. § 410.490 (1990) ..... *passim*
20 C.F.R. § 410.490(b) (1990) 14,25-27,31,32
20 C.F.R. § 410.490(b)(1)-(3) (1990) 14
20 C.F.R. § 410.490(b)(1) (1990) 16,25-27
20 C.F.R. § 410.490(b)(1)(i) (1990) 25,26,28
20 C.F.R. § 410.490(b)(1)(ii) (1990) ..... *passim*
20 C.F.R. § 410.490(b)(2) (1990) ..... *passim*
20 C.F.R. § 410.490(b)(3) (1990) ..... *passim*
20 C.F.R. § 410.490(c) (1990) 28,29
20 C.F.R. § 410.490(c)(1) (1990) 16,29
20 C.F.R. § 410.490(c)(2) (1990) 17,21,23,29,32
20 C.F.R. § 410.490(e) (1990) 10

Table of Authorities Continued

Page

20 C.F.R. Part 718 (1990) 31
20 C.F.R. § 718.2 (1990) 10
20 C.F.R. Part 725, subpart F (1990) 8
20 C.F.R. § 727.203 (1990) 3,4,27
20 C.F.R. § 727.203(a) (1990) 14
20 C.F.R. § 727.203(a)(1)-(5) (1990) 14
20 C.F.R. § 727.203(a)(2) (1990) 15,37
20 C.F.R. § 727.203(a)(3)-(5) (1990) 15
20 C.F.R. § 727.203(a)(3) (1990) 15,23,33,37
20 C.F.R. § 727.203(b) (1990) 16
20 C.F.R. § 727.203(b)(1) (1990) 16
20 C.F.R. § 727.203(b)(2) (1990) 17,18,21
20 C.F.R. § 727.203(b)(3) (1990) ..... *passim*
20 C.F.R. § 727.203(b)(4) (1990) ..... *passim*
20 C.F.R. § 727.203(c) (1990) 31
43 Fed. Reg. 36,825 (1978) 14
38 Fed. Reg. 16,966 (1973) 31
38 Fed. Reg. 16,965 (1973) 10
37 Fed. Reg. 18,013 (1972) 28

MISCELLANEOUS:

S. 1538, 95th Cong., 1st Sess. (1977) 12
H.R. 4544, 95th Cong., 1st Sess. (1977) 12
H.R. 10760, 94th Cong. 1st Sess. (1975) 39
H.R. 7, 94th Cong. 1st Sess. (1975) 39
Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 10,11,12

Table of Authorities Continued

	Page
Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)	11,15,21
Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st and 2d Sess. (1973-74)	11
Hearings on H.R. 18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (1971)	8
House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979)	9,11,39
H.R. Rep. No. 864, 95th Cong., 2d Sess. (1978)	13,40
S. Rep. No. 209, 95th Cong., 1st Sess. (1977)	9
H.R. Rep. No. 151, 95th Cong., 1st Sess. (1977)	9
S. Rep. No. 743, 92d Cong., 2d Sess. (1972)	9
H.R. Rep. No. 460, 92d Cong., 2d Sess. (1971)	8,9
124 Cong. Rec. 3431 (1978)	14
124 Cong. Rec. 3426 (1978)	14
124 Cong. Rec. 2333 (1978)	13
124 Cong. Rec. 2330 (1978)	13
U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (1989)	8
Comptroller General of the U.S., *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* (1977)	12
A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Diseases* (1986)	15,26

Table of Authorities Continued

	Page
J. Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* (1985)	10
Lapp, *A Lawyer's Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981)	26
Pendergrass, Lainhart, Bristol, Felson & Jacobson, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. (1972)	26
Developments in the Law: Toxic Waste Litigation, 99 Harv. L. Rev. 1458 (1986)	45
Respondent's Petition for Rehearing, *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 90-113)	42
Brief for Respondents Charles Broyles and Lisa Kay Colley, *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) (Nos. 87-821, 87-827 and 87-1095)	5
Official Transcript, Proceedings Before the Supreme Court of the United States, *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) (Nos. 87-821, 87-827 and 87-1095)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1714, 90-113 and 90-114

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

JOINT BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

OPINIONS BELOW

In Taylor's case, the opinion of the court of appeals is reported at 895 F.2d 178. Taylor App. 4a-16a.[1] The Order of the court of appeals denying petitions for rehearing filed by Clinchfield and DOL is unreported. Taylor App. 1a. The decision and order of the Benefits Review Board, United States Department of Labor, is unreported. Taylor App. 17a-19a. The Decision and Order of the Administrative Law Judge ("ALJ")—Rejection of Claim is unreported. Taylor App. 20a-32a.

In Dayton's case, the opinion of the court of appeals is reported at 895 F.2d 173. Dayton App. 2-7. The order of the court of appeals denying DOL's petition for rehearing and suggestion for rehearing en banc is unreported. Dayton App. 1. The decision and orders of the Benefits Review Board, Dayton App. 8-13, and the ALJ, Dayton App. 14-27, are unreported.

JURISDICTION

In both cases, the judgments of the court of appeals were rendered on February 5, 1990. In both cases, the court of appeals enlarged the time for filing petitions for rehearing to and including March 16, 1990. Timely petitions for rehearing were filed by Clinchfield in *Taylor* and by DOL in both cases. The court of appeals denied all petitions for rehearing on April 20, 1990. Taylor App. 1a; Dayton App. 1.

---

[1] The Solicitor General's motion to dispense with the printing of the joint appendix in Nos. 90-113 and 90-114 was granted on November 26, 1990. All necessary materials are reprinted in the appendices to the petitions for certiorari. In this Brief, citations to the "Taylor App." refer to the Appendix to the Petition for Writ of Certiorari filed by Clinchfield in No. 90-113. Citations to the "Dayton App." refer to the Appendix to the Petition for Writ of Certiorari filed by Consol in No. 90-114.

In both cases, jurisdiction was conferred on the court of appeals by the filing of timely petitions for review of the respective decision and orders of the Benefits Review Board, in accordance with 33 U.S.C. § 921(c), *incorporated by reference into* 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked in these cases under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Taylor Appendix:

1. U.S. Const. amend. V. Taylor App. 33a.

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988). Taylor App. 34a.

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). Taylor App. 35a-36a.

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988). Taylor App. 37a-38a.

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988). Taylor App. 39a.

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1990). Taylor App. 40a-42a.

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1990). Taylor App. 43a-45a.

STATEMENT OF THE CASE

A. Introduction

These consolidated cases mark the third time this Court has agreed to examine the meaning of a controversial DOL black lung eligibility regulation called the "interim presumption." There are two versions of the interim presumption. One was promulgated by the Social Security

Administration ("SSA") in 1972, at 20 C.F.R. § 410.490 (1990). The other was adopted by Labor in 1978, at 20 C.F.R. § 727.203. Real and perceived differences between the two presumptions have generated a substantial volume of litigation because of 30 U.S.C. § 902(f)(2) ("section 902(f)(2)"). Section 902(f)(2) provides: "Criteria applied by the Secretary of Labor" in certain categories of black lung claims "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 [with SSA] . . . ." SSA's rule applies only in claims filed with and adjudicated by SSA. DOL's rule applies only in claims adjudicated by DOL. Thus, in a claim that is denied under DOL's rule, there is a possibility that the claimant may challenge the denial on the theory that benefits would have been awarded if entitlement were adjudicated under SSA's rule.

In *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) ("*Pittston Coal Group*"), this Court invalidated DOL's rule to the extent that it precluded invocation of DOL's presumption by x-ray, biopsy or autopsy evidence unless the miner worked as a coal miner for at least ten years. This conclusion was compelled, in the opinion of the Court, because SSA's presumption was less restrictive. It could be invoked by a shorter term miner if (1) the record established the existence of pneumoconiosis ("black lung" disease) by x-ray, biopsy or autopsy evidence, and (2) additional evidence demonstrated that the disease diagnosed by these methods was caused by coal dust exposure. *Id.* at 109.

In *Pittston Coal Group*, this Court was also asked to address the Fourth Circuit's apparent invalidation of other portions of DOL's presumption permitting its rebuttal on the basis of proof (1) that the miner's total disability or death was not due in part to coal mine employment, or (2) that the miner does not or did not suffer from black lung disease. 20 C.F.R. § 727.203(b)(3), (4); *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub. nom.*

Pittston Coal Group, 488 U.S. at 121. Consideration of these matters was, however, deflected by a concession that the rebuttal rules adopted by DOL are valid even if they are more restrictive than SSA's rebuttal rules. *Pittston Coal Group*, 488 U.S. at 119.[2]

After *Pittston Coal Group*, several courts of appeals disagreed on the validity of Labor's rebuttal rules. The Sixth Circuit refused to invalidate 20 C.F.R. § 727.203(b)(3), notwithstanding the absence of a comparable provision in SSA's presumption, holding that the language and intent of the Black Lung Benefits Act required the consideration of relevant medical evidence proving that a miner's disability or death was unrelated to black lung disease. *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 (6th Cir. 1989).[3]

The Seventh Circuit disagreed, holding that the SSA rule did not require the consideration of relevant medical evidence and was, therefore, less restrictive than DOL's rule requiring the consideration of all relevant medical evidence. *Hubert Taylor v. Peabody Coal Co.*, 892 F.2d 503, 506-07 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696).[4]

---

[2] The concession was explained in briefing and at oral argument. Brief for Respondents Charlie Broyles and Lisa Kay Colley at 18-19 n.20, *Pittston Coal Group*, 488 U.S. 105 (Nos. 87-821, 87-827, and 87-1095 consolidated); *see also* Official Transcript, Proceedings Before the Supreme Court of the United States, at 31-34 (Oct. 3, 1988), *Pittston Coal Group*, *supra*. Counsel of record for Broyles are the same attorneys who now represent petitioner Pauley in No. 89-1714; they have apparently changed their views for purposes of the instant cases.

[3] Milliken was disabled by and died due to arteriosclerotic cardiovascular disease. The ALJ and court relied on proof showing that "pneumoconiosis could not have contributed to Milliken's death and could not have caused any impairment or disability . . . ." 866 F.2d at 197.

[4] A motion to include Hubert Taylor's case among the others was denied by this Court. *Peabody Coal Co. v. Taylor*, 59 U.S.L.W. 3324 (U.S. Oct. 29, 1990) (No. 89-1696). In Hubert Taylor's case, the medical

Next, the Third Circuit upheld section 727.203(b)(3) in a case involving a former coal miner disabled solely as a result of arthritis and a stroke. *BethEnergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1989), *cert. granted sub nom. Pauley v. BethEnergy Mines Inc.*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 89-1714). The court of appeals refused to interpret section 410.490 and 30 U.S.C. § 902(f)(2) as mandating that "a claimant who is statutorily barred from recovery may nevertheless recover." 890 F.2d at 1299-1300 (footnote omitted).

The Fourth Circuit followed with its decisions in *Taylor* and *Dayton*. Relying on its prior analysis in *Broyles*, the Fourth Circuit reversed denials of benefits in Taylor's and Dayton's cases even though these miners do not suffer from black lung disease. The court observed, very simply, that the absence of the disease was not a basis for rebuttal under the SSA rule, and it could not, therefore, support rebuttal under DOL's rule in keeping with the restrictivity prohibition of section 902(f)(2). *Taylor*, 895 F.2d at 182-83; *Dayton*, 895 F.2d at 175.

The employers in *Hubert Taylor*, *John Taylor* and *Dayton*, and the claimant in *Pauley* filed petitions for certiorari. The Court granted writs in *John Taylor*, *Dayton* and *Pauley* and consolidated the cases for review.[5]

B. Background of the Black Lung Benefits Program

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988) ("the Act"),[6] establishes a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis. *Id.* § 901(a). The program is divided into two segments called "Part B," *id.* §§ 921-925, and "Part C," *id.* §§ 931-945. The Part B program began on December 30, 1969, and terminated for new claims on June 30, 1973. Part B claims were filed with SSA and adjudicated under regulations published by the Secretary of Health, Education and Welfare ("HEW"). Benefits awarded under Part B are paid by the U.S. Treasury from general revenues. *See Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 139 (1987). Part B claims are adjudicated in accordance with procedures specified in section 205 of the Social Security Act. 42 U.S.C. § 405, *incorporated by reference into* 30 U.S.C. § 923(b).

Claims filed on or after July 1, 1973 (*i.e.*, Part C claims), are filed under the workers' compensation law of the state in which the miner was employed, if that law has been found adequate by the Secretary of Labor. 30 U.S.C. § 931. In the absence of an approved state law,[7] the claimant may file a claim with the U.S. Department of Labor under regulations published by the Secretary of Labor. *Id.* §§ 902(f), 932, 936.[8] Approved Part C claims are paid by

---

evidence demonstrated minimal pneumoconiosis that did not prevent Taylor from working. This Court's disposition of the cases accepted for review at this time should also resolve the question presented in Hubert Taylor's case.

[5] This brief is filed jointly by Clinchfield and Consol to seek reversal of the Fourth Circuit's decisions in Nos. 90-113 and 90-114. Separate briefs are unnecessary. The arguments made in this joint brief are equally relevant to the Court's consideration of Mrs. Pauley's case.

[6] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 312, 313, and the Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330.

[7] No state's law has been approved under 30 U.S.C. § 931.

[8] The statutory procedures for the adjudication of Part C claims are set forth in the Longshore Act. 33 U.S.C. §§ 901-950 (1988), *incorporated by reference in part into* 30 U.S.C. § 932(a). These include an Administrative Procedure Act trial before an ALJ, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d), an administrative appeal to the Benefits Review Board, *id.* § 921(b), and a further appeal to a United States court of appeals, *id.* § 921(c).

the mine operator that last employed the miner or by its insurance carrier, 20 C.F.R. Part 725, subpart F (1990), or by an accounting entity called the Black Lung Disability Trust Fund, 30 U.S.C. §§ 932, 933, 934, 934a (repealed 1982).[9] The Trust Fund is financed by a manufacturers excise tax on coal. 26 U.S.C. § 4121. If unable to meet current obligations from coal tax revenues, the Trust Fund borrows from the Treasury and is obligated to repay these amounts with interest.[10] 26 U.S.C. § 9501(c).

Parts B and C also differ in concept. Part B was a remedial measure designed to establish a special benefit for miners whose state workers' compensation laws did not, in the past, compensate disability or death due to black lung disease. *See* H.R. Rep. No. 460, 92d Cong., 2d Sess., pt. 1, at 5-7 (1971); *Hearings on H.R.18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 56-58 (1971). Part C was intended to facilitate the integration of the federal program into existing state workers' compensation laws or to function like, and in lieu of, a state workers' compensation program.[11]

---

[9] The Trust Fund is responsible for the payment of claims predicated upon coal mine employment terminated prior to January 1, 1970, 30 U.S.C. § 932(c), or where no responsible mine owner can be identified, or if the identified mine owner refuses to pay the claim, 26 U.S.C. § 9501(d), *incorporated by reference into* 30 U.S.C. § 932(j). The Trust Fund also pays all administrative expenses of the black lung program, *id.* § 9501(d)(5), and the attorneys' fees of counsel representing claimants whose benefits are paid by the Trust Fund. *See, e.g., Republic Steel Corp. v. United States Dep't of Labor*, 590 F.2d 77 (3d Cir. 1978).

[10] As of September 1989, the Trust Fund owed over $3 billion to the Treasury. U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1989).

[11] Section 224a(2)(A) of the Social Security Act, 42 U.S.C. § 424a(2)(A), requires the reduction of social security disability insurance benefits by workers' compensation benefits paid to the SSDI beneficiary. For purposes of section 224, Part C benefits are deemed workers' compensation benefits but Part B benefits are not. 30 U.S.C. § 922(b).

See H.R. Rep. No. 460, *supra* at 26-28; S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (stating it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations"); *see also Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 397 (7th Cir. 1987).

C. Origins of the Interim Presumptions

The original Act delegated exclusive authority to write medical eligibility rules for both Part B and Part C claims to the Secretary of HEW.[12] Congress substantially revised the Act in 1972. Black Lung Benefits Act of 1972, Pub. L. No. 29-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-36 (1976). These amendments did not empower DOL to write eligibility regulations, but the deliberations preceding enactment of the amendments brought to Congress's attention several problems experienced by SSA in its efforts to process claims. These problems included an unexpectedly large volume of filings and a shortage of medical testing facilities in coal mining regions. S. Rep. No. 743, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23.

Although the 1972 amendments did not respond directly to these concerns, the Senate Committee on Labor and Public Welfare included in its Report special instructions to SSA.

---

[12] *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(f), 411, 83 Stat. 793 (1969). The Secretary of Labor believed he had no authority to write medical eligibility standards and so informed Congress. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 508, 522-26 (Comm. Print 1979) ("*1977 Legislative History*").

> Accordingly, the Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these Amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW].

Id.

SSA complied[13] by promulgating section 410.490, entitled "Interim Adjudicatory Rules for Certain Part B Claims . . . ." At the same time, SSA also published permanent medical eligibility regulations for use if section 410.490 was unavailing in a particular case, 20 C.F.R. § 410.490(e), and for application in all Part C claims. *Id.* §§ 410.401-476. When the DOL program came on line in 1973, Labor adopted SSA's permanent rules by reference, excluding section 410.490. 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1973) (amended 1978).

Congressional oversight of the black lung program was pervasive in the 1970s, and it was not long before program advocates in Congress became aware that DOL was approving a lower percentage of claims than had SSA. The unavailability of an interim presumption was identified as an important reason for this disparity. *See Oversight of the Administration of the Black Lung Program, 1977: Hearings*

[13] One commentator has concluded that the Senate Report language was part of a secret arrangement between SSA and Senate Committee staff to ensure an increased approval rate for SSA claims. Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 92 (1985).

Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 49 (1977) ("*1977 Senate Hearings*"); *Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974).

Congress began the consideration of another round of comprehensive black lung amendments in the mid-1970s. In the course of these proceedings, the committees involved considered many proposed revisions to the Act. *See 1977 Legislative History, supra* note 12, at 1-109. The use of an interim presumption by DOL was among the revisions considered, and this generated controversy.

Two SSA staff physicians testified variously that the medical criteria in section 410.490 were scientifically invalid, and that SSA's lawyers wrote section 410.490 to eliminate the agency's backlog, erring on the side of an award.[14] Labor Department witnesses echoed SSA's views and sought authority to write scientifically supportable eligibility rules.[15] The Comptroller General of the United States reported that SSA's application of section 410.490

[14] *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) ("*1977 House Hearings*"); *1977 Senate Hearings, supra* p. 10, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA). The American Lung Association and the American Thoracic Society also urged Congress not to perpetuate the use of scientifically invalid benefit eligibility criteria like those contained in the SSA presumption. *1977 House Hearings, supra* at 259-60 (statement of Hans Weill, M.D.).

[15] *1977 Senate Hearings, supra* p. 10, at 154; *1977 House Hearings, supra* note 14, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

produced large numbers of "unsubstantiated" awards.[16] This Report concluded that any effort to make the SSA interim presumption applicable to Part C claims should also direct the Labor Department to substantiate entitlement by medical evidence. SSA informed the Comptroller General that it was unable to develop evidence substantiating an award under the presumption because it lacked the resources to do so.[17] Although SSA clearly admitted that it did not attempt to substantiate entitlement by developing or considering rebuttal evidence, the agency never denied the possibility of rebuttal or expressed an opinion that the rebuttal of any fact presumed under section 410.490 was not contemplated by the agency's rule.

The House passed a bill requiring the Labor Department to apply criteria "not more restrictive than" SSA criteria in Part C claims. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977). The Senate bill authorized the Secretary of Labor to write new Part C eligibility criteria. S. 1538, 95th Cong., 1st Sess. § 2 (1977). The compromise bill conformed to the Senate version, but also provided that until DOL published better eligibility regulations, criteria applied to claims filed before issuance of the new rules "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . ." 30 U.S.C. § 902(f)(2).

Like the interim presumption itself, the administrative practices followed by SSA in applying the rule were, as noted, controversial. In keeping with the recommendations of the Comptroller General, the conferees on the 1977 amendments cautioned DOL not to repeat SSA's history of making unsubstantiated awards:

---

[16] Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47, 51-52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 10, at 316-20, 324-25.

[17] *Id.* at 46.

> The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.*

H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309 (emphasis added).

This admonition carried over into the floor debates prior to enactment. Senator Javits, a conference manager, stated:

> I . . . requested that the statement of managers include language to the effect that "all relevant medical evidence" be considered in applying the interim standards . . . in order to more clearly explain the intent of the new section 402(f)(2) of the act. . . .
>
> These amendments I believed were not intended to require payment of a claim where the evidence in the file is fragmentary or otherwise incomplete, but to require payment of a claim when there is evidence of the presence of pneumoconiosis and that it has caused disability for coal mine work. . . .

124 Cong. Rec. 2330, 2333 (1978). A similar understanding was expressed in debate among the House conference managers: "We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim stand-

ards to Part C claims within the context of all relevant medical evidence. But there is no such direction or requirement imposed on HEW . . . ." 124 Cong. Rec. 3426, 3431 (1978) (statement of Congressman Perkins). It is clear that Congress ordered DOL to write an interim presumption requiring the consideration of all relevant medical evidence at some point in the adjudication of a claim, and to take appropriate steps to ensure the validity of awards.

D. A Comparison of the Presumptions

1. Invocation

DOL published its interim presumption on August 18, 1978. 43 Fed. Reg. 36,825 (1978). There are similarities and differences between it and the SSA version. Both are burden shifting devices that relieve the claimant of the need to prove all of the elements of entitlement.[18] If invocation of either presumption is proven by the claimant, a prima facie case of entitlement is established. 20 C.F.R. §§ 410.490(b), 727.203(a).

DOL's rule lists five alternative ways to invoke while SSA's lists two. *Compare* 20 C.F.R. § 410.490(b)(1)-(3) *with id.* § 727.203(a)(1)-(5). After *Pittston Coal Group*, x-ray, biopsy or autopsy proof of the existence of pneumoconiosis combined with either ten years of coal mine employment or independent proof that the disease is caused by coal mine employment is sufficient to establish either presumption. Fifteen years of underground or comparable mining employment coupled with pulmonary function test

[18] The Act compensates total disability or death due to pneumoconiosis exclusively. Benefits may not be awarded unless (1) the existence of pneumoconiosis is established, (2) the disease arose out of coal mining exposure, (3) the miner is totally disabled or deceased, and (4) the total disability or death of the miner was caused, at least in part, by the occupationally related disease. *See Mullins Coal Co.*, 484 U.S. at 141.

("PFT")[19] results meeting published values may establish the SSA presumption. *Id.* § 410.490(b)(1)(ii). Ten years of employment in any type of coal mining coupled with qualifying PFT results establish the DOL presumption. *Id.* § 727.203(a)(2). The DOL presumption may also be invoked with a ten-year history of coal mine employment and arterial blood gas ("ABG") test results[20] meeting published values, medical opinion evidence establishing the presence of a totally disabling respiratory or pulmonary impairment or, in the case of a deceased miner, by lay evidence if no relevant medical evidence is available. *Id.* § 727.203(a)(3)-(5). SSA's interim presumption does not include blood gas invocation criteria, but the agency's rules elsewhere establish a blood gas based method for an award. 20 C.F.R. Part 410, subpart D, Appendix. It is far more restrictive than DOL's ABG presumption.[21]

SSA's invocation subsection also contains several presumptions within the SSA interim presumption. 20 C.F.R.

[19] PFTs measure an individual's ability to move air in and out of the lungs during the course of specified maneuvers. Test results do not establish a diagnosis of any particular disease but may detect a deviation from normal pulmonary capabilities attributable to an array of acute or chronic illnesses. *See* A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Diseases* 4-5, 19, 67-68 (1986). The threshold values needed for invocation of both the SSA and DOL presumptions are essentially normal for older miners and were set at that level to make the presumption more readily available. *1977 House Hearings*, *supra* note 14, at 274-75 (testimony of Harold I. Passes, M.D.).

[20] ABGs measure dissolved gases in arterial blood. Abnormal results are not diagnostic of pneumoconiosis and may reflect a wide variety of acute or chronic illnesses. *Miller*, *supra* note 19, at 162, 176, 376-78.

[21] Under SSA's rule, the claimant must prove the existence of pneumoconiosis and present qualifying ABG test results. Qualifying ABG scores are more difficult to obtain under the SSA rule. It is also not apparent that the SSA rule shifts the burden of persuasion away from the claimant. *Compare* 20 C.F.R. Part 410, subpart D, Appendix *with* 20 C.F.R. § 727.203(a)(3).

§ 410.490(b)(2), (3). First, under section 410.490(b)(2), a claimant whose proof satisfies the x-ray, biopsy, autopsy or PFT criteria cannot benefit from the SSA interim presumption unless the abnormality detected "arose out of coal mine employment." The cross-reference in section 410.490(b)(2) to 20 C.F.R. §§ 410.416 and 410.456, makes clear that the "impairment" or "pneumoconiosis" is presumed to have arisen out of coal mine employment, "in the absence of persuasive evidence to the contrary" if the miner worked in coal mining for at least ten years, *id.* §§ 410.416(a), 410.456(a), or if the proof establishes that the impairment arose out of coal mine employment, *id.* §§ 410.416(b), 410.456(b); *see also Pittston Coal Group*, 488 U.S. at 109. Section 410.490(b)(3) addresses PFT invocation only, and it presumes total disability or death due to pneumoconiosis if the miner had at least ten years of mining employment.[22] It is apparent, however, that invocation of the SSA rule cannot be completed unless section 410.490(b)(1) proof also satisfies the requirements of section 410.490(b)(2) and (3).

2. Rebuttal

Invocation of either presumption shifts the burdens of production and ultimate persuasion to the government or the mine operator. *See Mullins Coal Co.*, 484 U.S. at 144 & n.12. DOL's rebuttal rule begins with a caveat requiring the consideration of "all relevant medical evidence." *Id.* at 149-50; 20 C.F.R. § 727.203(b). SSA's rule makes no similar nor contradictory statement.

Either presumption is rebutted if the miner is performing "his usual coal mine work or comparable and gainful work." 20 C.F.R. §§ 410.490(c)(1), 727.203(b)(1). The SSA rule specifies only one additional rebuttal methodology,

[22] Section 410.490(b)(3) is either surplusage or a mistake, or the reference to "paragraph (b)(1)" in section 410.490(b)(2) is overinclusive. *See Pittston Coal Group*, 488 U.S. at 129 (Stevens, J. dissenting).

while DOL's rule lists three. SSA's remaining provision requires rebuttal if:

> Other evidence including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (*see* § 410.412(a)(1)).

Id. § 410.490(c)(2). Section 410.412(a)(1) is part of a rule called " 'Total disability' defined." Paragraph (a)(1) provides that "[a] miner shall be considered totally disabled due to pneumoconiosis if: (1) his pneumoconiosis prevents him from engaging in gainful work . . . (that is, "comparable and gainful work;" *see* §§ 410.424-410.426. . . .)." Sections 410.424-410.426 list medical and non-medical criteria for determining whether the miner is totally disabled "due to pneumoconiosis." 20 C.F.R. §§ 410.424, 410.426.

DOL's second rebuttal method is similar to, but not the same as, SSA's second method. DOL's rule contemplates rebuttal if "in light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (*see* § 410.412(a)(1) of this title)." 20 C.F.R. § 727.203(b)(2). SSA's focus on "other evidence" in contrast to DOL's focus on "all relevant evidence" may reflect the fact that SSA's invoking evidence is pre-tested for relevance and meaning prior to invocation under section 410.490(b)(2), (3).[23]

DOL's rule also contains two rebuttal methods not specifically included in SSA's rule. The DOL presumption is

[23] The difference may reflect SSA's preference for a "cookbook" approach to deciding claims in contrast to DOL's preference for traditionally adjudicated determinations. This possibility is supported by SSA's occasional findings that its interim presumption was rebutted by negative blood gas tests (*i.e.*, exercise tolerance tests) and PFTs. *See e.g.*, *Oliver v. Califano*, 476 F. Supp. 12, 16 (D. Utah 1979); *Mutter v. Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

rebutted if the proof establishes that the miner's total disability or death "did not arise in whole or in part out of coal mine employment," 20 C.F.R. § 727.203(b)(3), or if "the evidence establishes that the miner does not, or did not, have pneumoconiosis," *id.* § 727.203(b)(4). Accordingly, whatever facts are presumed after invocation in a DOL case are rebuttable if the record as a whole demonstrates the falsity of the presumed fact.[24] On the other hand, SSA's rule is structurally complex, making it more difficult to determine precisely where each element of entitlement is considered.

---

[24] There are hundreds of reported decisions by the courts of appeals interpreting DOL's rebuttal provisions and many subtle variations in the approaches taken within and among the circuits. Generally, rebuttal may be established under section 727.203(b)(2) if the miner is not physically disabled for work by a health impairment. *See, e.g., Ramey v. Kentland Elkhorn Coal Co.*, 755 F.2d 485, 486 n.3, 490 (6th Cir. 1985). Rebuttal by this method is not precluded if the miner is unemployed or too old to work. *See Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 908-09 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 84 (1990); *Taft v. Alabama By-Products*, 733 F.2d 1518, 1522 (11th Cir. 1988) ("the Act should provide payment for medical disability and should not be a form of unemployment compensation."). Rebuttal by the third method is generally established if the employer affirmatively demonstrates that pneumoconiosis did not contribute to the miner's disabling condition or death. *See, e.g., Peabody Coal Co. v. Holskey*, 888 F.2d 440, 442 (6th Cir. 1989); *Amax Coal Co. v. Burns*, 855 F.2d 499, 502 (7th Cir. 1988); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124 (4th Cir. 1984). Rebuttal may be established under the fourth method if the proof affirmatively demonstrates that the miner does not have clinical pneumoconiosis (diagnosed by x-ray, biopsy or autopsy evidence) or so-called "legal" pneumoconiosis defined as a "respiratory or pulmonary impairment arising out of coal mine employment." *See* 30 U.S.C. § 902(b); *see also Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986); *Knudtson v. Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986); *Long v. Itmann Coal Co.*, No. 84-1865, 838 F.2d 466 (Table) (4th Cir. May 19, 1987). Rebuttal of the DOL presumption is accomplished only by strongly persuasive evidence demonstrating the falsity of a presumed fact.

E. John Taylor's Case

Taylor retired from mining in 1972, after eleven and three quarters years of coal mine employment, and filed a claim for benefits with DOL on November 5, 1976. Taylor App. 23a-24a. The ALJ found that chest x-rays failed to prove the existence of pneumoconiosis and none of the PFTs submitted satisfied DOL's invocation standards. *Id.* at 27a.[25] Several recent ABG studies met invocation values and the DOL presumption was invoked on this basis. Turning to a rebuttal inquiry, the ALJ surveyed a record that persuasively and overwhelmingly attributed Taylor's blood gas abnormality to obesity and chronic bronchitis due to a long, ongoing history of cigarette smoking. *Id.* at 29a-31a.[26] The ALJ concluded that the presumption was rebutted under 20 C.F.R. § 727.203(b)(3) and (4) by proof that Taylor did not have pneumoconiosis or any related disability. Taylor App. 31a.

The Benefits Review Board affirmed on May 14, 1987. *Id.* at 19a. Taylor filed a substantial evidence appeal with the Fourth Circuit. He suggested that *Pittston Coal Group*, as a matter of principle, invalidated the third and fourth rebuttal methods in DOL's regulations. The court of appeals agreed, noting simply that DOL's rule had extra rebuttal provisions not in SSA's rule. It held that those extra provisions could not be applied in light of *Pittston Coal Group* and 30 U.S.C. § 902(f)(2). 895 F.2d at 182-83.

The court's reasoning is strictly impressionistic; it includes no careful textual analysis of SSA's rule. The court found it immaterial that Taylor's qualifying blood gas stud-

---

[25] Thus Taylor could not have invoked the SSA presumption.

[26] One pulmonary disease specialist reported: "As to the etiology of his chronic bronchitis, I think it is without question secondary to his years of cigarette smoking. . . . I do not believe that he has any impairment that could be possibly attributed to coal workers' pneumoconiosis." Taylor App. 30a-31a.

ies could not have invoked the SSA presumption. It held: "[W]e do not accept any argument that the rebuttal provisions must be pegged to the invocation provisions. It is the fact of establishment . . . which is of consequence . . . , not the number of the regulation which provides for such establishment." *Id.* at 182. The court of appeals vacated the denial and remanded.[27] Chief Judge Ervin dissented. He sided with the Third and Sixth Circuits' holdings validating DOL's rebuttal rules:

> It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

Id. at 184 (Ervin, C.J. dissenting).

F. Albert Dayton's Case

Dayton filed his claim on November 26, 1979, after seventeen years of coal mine employment. The ALJ found Dayton's chest x-rays to be preponderantly negative, but

---

[27] The court of appeals ruled out any possibility of rebuttal if the miner did not have pneumoconiosis, 895 F.2d at 183, but remanded for review of the "disability causation" question under 20 C.F.R. § 410.416. The court erroneously concluded that section 410.416 and section 727.203(b)(3) addressed the same fact element. The SSA provision focuses on the cause of a miner's disease while the DOL rebuttal rule addresses the cause of the miner's total disability. Later, the Fourth Circuit acknowledged this error suggesting the irrelevancy of a remand for this purpose. *Robinette v. Director, Office of Workers' Compensation Programs*, 902 F.2d 1566 (Table), slip op. at 8 & n.9 (4th Cir. Apr. 27, 1990), *petition for cert. filed*, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172). In *Robinette*, the Fourth Circuit asked Congress or this Court "to clarify these confusing regulations."

invoked DOL's presumption in light of PFT results meeting published guidelines. Dayton App. 19-20. After a review of the entire record, including the reports of several pulmonary disease specialists, the ALJ concluded that Dayton was not totally disabled for work and did not suffer from pneumoconiosis. DOL's presumption was, therefore, persuasively rebutted under both sections 727.203(b)(2) and (4).[28] Dayton App. 24, 26. There was no need to address the cause of Dayton's non-existent disability.

The Benefits Review Board affirmed the ALJ's conclusion that Dayton did not have pneumoconiosis, finding it unnecessary to address the ALJ's alternative finding that Dayton was not totally disabled. Dayton App. at 10 n.1, 12. Dayton appealed to the Fourth Circuit. Relying exclusively on its decision in *Taylor*, the court of appeals reversed and remanded for adjudication under section 410.490. 895 F.2d at 176.[29] The Fourth Circuit dismissed the ALJ's finding of no pneumoconiosis as "superfluous" and having "no bearing on the case." *Id.* at 176 n.*.

---

[28] There is no logical mismatch between qualifying PFTs and an absence of disability. PFT invocation values merely trigger a burden of proof shift and were not designed to detect true disability. *See 1977 House Hearings*, *supra* note 14, at 259-60, 274-75 (testimony of Hans Weill, M.D.; testimony of Dr. Harold I. Passes); *see also Mullins Coal Co.*, 484 U.S. at 143; *Pittston Coal Group*, 484 U.S. at 138 (Stevens, J. dissenting) (citing SSA testimony stating, "it was acknowledged that these criteria would not necessarily describe a level of impairment which would impose a functional limitation on the individual." Citation omitted).

[29] The Fourth Circuit refused to consider the ALJ's finding that in Dayton's case the DOL presumption was also rebutted under section 727.203(b)(2), which is roughly equivalent to SSA's rebuttal section 410.490(c)(2). Here, the court noted that the Board did not review this matter, and the court would not, therefore, do so. 895 F.2d at 175. The Fourth Circuit also refused to consider the Government's suggestion that precluding rebuttal by proof that the miner has no occupationally related disease or disability violates the operator's due process rights. The Court deemed it an "interesting question" but believed that it was not one that DOL's lawyers could raise. *Id.*

SUMMARY OF ARGUMENT

The court below reached a decision that is irrational and unnatural. It requires mine operators to pay federal black lung benefits to miners who do not have black lung disease. The Fourth Circuit's conclusion is not the product of an evidentiary quirk or newly discovered backwater of the Act affecting only a few black lung cases. The conclusion affects thousands of pending cases, and had it been reached a decade ago, would have made a difference in hundreds of thousands of cases. The conclusion reorders the basic landscape of the program, springs an unexpected, unfunded, and most likely unfundable liability on the industries involved, and is fundamentally unreasonable.

The court below held that DOL's interim presumption violates the restrictivity prohibition of 30 U.S.C. § 902(f)(2) because the DOL rule permits rebuttal by proof that the miner did not suffer from pneumoconiosis or related disability or death, while SSA's rule does not. The court also held in *Taylor* that invocation of the DOL presumption by blood gas studies preserves the more limited SSA rebuttal rules, even though SSA did not permit invocation of its presumption by blood gas test results.

However one patches together bits and pieces of the Act, the rules, and the case law, the conclusion of the Fourth Circuit makes no sense. It tacitly assumes that Congress deliberately misled the mining and insurance industries, the Department of Labor and the American public. It assumes a uniquely punitive intent on the part of Congress that is so strong and unfocused on any genuine wrongdoer, that it justifies the wholesale deprivation of defendants' fundamental rights to have their day in court. It assumes that Congress wrote a law requiring employers to fund and compensate total disability or death due to a distinct occupational disease but, in reality, was disinterested in whether the employer was in any way responsible for causing disease, disability or death. If the Fourth Circuit's assumptions are legally viable, they certainly go well beyond any theory of liability known to our legal system.

The Fourth Circuit's holding and underlying assumptions are not, however, correct. They are the product of an incomplete and simplistic review that cannot withstand careful scrutiny.

Although the language and contours of the Act are critically important, one need not even consult the Act to see that the Fourth Circuit's elemental comparison of the two rules was inaccurate. SSA's criteria allowing the affirmative use of blood gas test evidence are plainly more restrictive than DOL's. *Compare* 20 C.F.R. Part 410, subpart D, Appendix *with* 20 C.F.R. § 727.203(a)(3). On the rebuttal side, DOL's rule allowing rebuttal if the miner does not or did not have pneumoconiosis is not more restrictive and is probably less so than SSA's approach. SSA requires the claimant to affirmatively prove that he has pneumoconiosis before the SSA presumption may be invoked. 20 C.F.R. §§ 410.490(b)(2), (3). No rebuttal rule on this fact element is necessary within the SSA scheme. Similarly, DOL's rule allowing rebuttal if the disability or death of the miner did not arise in part out of coal mining, *i.e.*, the "disability causation" element, is also in SSA's rules. It is only more difficult to find. To find it, one follows the cross-references in section 410.490(c)(2) to section 410.412(a)(1) and section 410.426(a). Upon arrival, it is apparent that SSA's disability causation criterion is a "primary reason" standard that looks fairly restrictive in comparison to DOL's "in whole or in part" approach. The comparison test alone demonstrates the Fourth Circuit's error.

The Act confirms the lower court's error. The Act focuses the inquiry in all claims on total disability or death due to pneumoconiosis. It prohibits the assignment of liability to a mine operator unless the mine operator was responsible for causing the requisite total disability or

death. 30 U.S.C. § 932(c). The Act also directs the claim adjudicator to ensure that all the relevant evidence that has meaning in connection with each element of the claim is given full and proper consideration. *Id.* § 923(b). The legislative history, for all its rhetoric, is fully supportive.

Although a deference analysis should not be necessary, it too validates DOL's rebuttal rules. DOL's election to write regulations on the assumption that the Act means what it says is difficult to fault. The ambiguities, complexities, and inconsistencies in SSA's body of regulations cannot detract from this conclusion.

Finally, if the court below read 30 U.S.C. § 902(f)(2) correctly, the due process concern expressed by dissenting Chief Judge Ervin and others is very real. The Due Process Clause circumscribes legislation that takes private property for no good reason at all. If one person causes injury to another, the Congress may legislate just compensation. It is, we suggest, another matter when Congress makes up the injury and then requires compensation for something that does not exist by prohibiting inquiry into the truth of the matter. If it comes this far, the court below clearly reads 30 U.S.C. § 902(f)(2) to be a truly arbitrary mandate.

The decisions of the Fourth Circuit in these cases should be reversed. The Third Circuit was correct.

ARGUMENT

I.

DOL'S INTERIM CRITERIA ARE NOT MORE RESTRICTIVE THAN SSA'S WITH RESPECT TO BLOOD GAS STUDIES OR REBUTTAL GENERALLY

A. DOL's Third and Fourth Rebuttal Rules Are Not Invalidated Generally By 30 U.S.C. § 902(f)(2)

DOL's rules permitting rebuttal of that agency's interim presumption by proof that the miner does not or did not

have pneumoconiosis or related disability are not facially invalid under section 902(f)(2), because they are not more restrictive than SSA's criteria.

The tension between SSA's and DOL's rules addressed in *Pittston Coal Group* was fairly clear and undisputed. The Court needed only to track the internal cross-references in SSA's rule to determine that DOL's approach disadvantaged short-term coal miners and their survivors presenting valid x-ray, biopsy or autopsy proof of pneumoconiosis. 488 U.S. at 109. The same exercise, testing one rule against the other is required here. DOL's rebuttal rules do not flunk this test, even if the restrictivity prohibition of section 902(f)(2) is applied to the two sets of rules in isolation from the rest of the Act.

The two elements purportedly absent from SSA's criteria are inquiries into (1) whether the miner actually has or had pneumoconiosis, and (2) whether a miner's presumed total disability was caused by that occupational disease.

The fact is that the presence or absence of pneumoconiosis is a critical inquiry in all claims decided under SSA's interim criteria. In order to gain the benefit of SSA's presumption, no claimant may satisfy the criteria in section 410.490(b) merely by meeting the proof requirements of section 410.490(b)(1). The further requirements of paragraphs (b)(2) and (3) must also be considered. Under paragraph (b)(2), a claimant who meets the requirements of paragraphs (b)(1)(i) and (ii) cannot obtain the benefit of the presumption unless "the impairment established . . . arose out of coal mine employment (*see* §§ 410.416 and 410.456)." 20 C.F.R. § 410.490(b)(2). "Pneumoconiosis" is defined in the Act to mean "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). On its face, section 410.490(b)'s prerequisites for invocation include: (1) abnormal x-ray, biopsy, or autopsy

evidence or abnormal PFTs, *and* (2) proof that the abnormality diagnosed by these methods arose out of coal mine employment, *i.e.*, that the abnormalities are due to a coal mine employment related dust disease or impairment.

The cross-references in section 410.490(b)(2) to section 410.416 and 410.456[30] ease this proof element if the miner had ten years of mining employment by erecting a presumption of disease causation that carries the day "in the absence of persuasive evidence to the contrary."[31] 20 C.F.R. §§ 410.416(a), 410.456(a). The short-term miner with the requisite x-ray, autopsy or biopsy evidence gets the section 410.490(b) presumption only if there is direct proof establishing disease causation, *id.* §§ 410.416(b), 410.456(b), and indeed, this is the holding of *Pittston Coal Group*, 488 U.S. at 117. The short-term miner with qualifying PFTs cannot obtain benefit of the presumption at all due to the fifteen-year requirement of section 410.490(b)(1)(ii).

It follows from *Pittston Coal Group's* reliance on sections 410.416 and 410.456 to discern the criteria applicable in the case of certain short-term miners, that the longer

[30] Section 410.416 applies to the claims of miners and section 410.456 applies in claims filed by survivors of miners. The two rules are not meaningfully different in substance.

[31] There is no logical flaw or true redundancy in this interpretation harmonizing 20 C.F.R. § 410.490(b)(1) with section 410.490(b)(2). PFT tests are not medically competent to establish an occupational cause for below normal test results. *See Miller*, *supra* note 19, at 4-5. Similarly, an abnormal chest x-ray meeting the requirements of section 410.490(b)(1)(i) standing alone is not diagnostic of black lung disease. It may exhibit a lung tissue reaction due to coal dust, other dusts, smoking, an infectious process, or other causes. Pendergrass, *et al.*, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyers Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981). Biopsy or autopsy findings may be more definitive. Typically, the pathologist's report in those circumstances will state the cause of abnormal findings.

term miner's attempt to gain the benefit of the presumption is also dependent upon whether the affirmative proof presented withstands section 410.416(a) or section 410.456(a) rebuttal proof demonstrating that the miner's abnormal x-ray, biopsy, or autopsy, or qualifying PFTs do not show pneumoconiosis. In either case, an SSA adjudication under section 410.490(b) inquires into the presence or absence of pneumoconiosis in the pre-invocation phase of the adjudicator's analysis.[32]

Under DOL's rule, this inquiry takes place only in the rebuttal phase. 20 C.F.R. § 727.203(b)(4). On its face, DOL's approach is probably more favorable to claimants. The "pneumoconiosis" inquiry under the DOL rule clearly assigns the burdens of proof and persuasion on the issue to the employer, while the allocation of the burden of persuasion under SSA's rules is ambiguous, at best, and may lie with the claimant. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 27. SSA's rule tightly links the test results of section 410.490(b)(1) to the occupational causation inquiry under paragraphs (b)(2) or (3), while under DOL's rule, any other indication of pulmonary disease (*e.g.*, medical reports, unlisted tests) may preclude rebuttal of DOL's presumption unless the employer also proves that these other indicators of lung disease are inaccurate or fail to connect the disease to coal dust exposure. Thus, in an SSA claim, proof that qualifying PFTs do not show an impairment arising out of coal mine employment rebuts the section 410.416(a) presumption and eliminates the benefit of section 410.490. In a DOL claim decided under section 727.203, it is not enough to merely rebut PFT

[32] This conclusion holds under either the *Pittston Coal Group* majority's reading of section 410.490(b)(2) and (b)(3), or the dissent's reading of these rules. Although it is not possible to make perfect sense out of paragraphs (b)(2) and (3), one or both of these rules imposes a substantive disease causation requirement whether the claimant is relying on the x-ray method of proceeding or PFTs. *See Pittston Coal Group*, 488 U.S. at 120; 488 U.S. at 130-31 (Stevens, J. dissenting).

evidence. The employer must prove in light of all the evidence that the miner does not have pneumoconiosis. *See, e.g., Pavesi v. Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965 (3d Cir. 1985).

The linguistic comparison prescribed by *Pittston Coal Group* validates DOL's rule allowing rebuttal if the miner does not or did not have pneumoconiosis.[33] It suggests that DOL's approach is, in fact, less restrictive than SSA's.

A similar analysis in isolation validates 20 C.F.R. § 727.203(b)(3). Under (b)(3), DOL's presumption is rebutted if it is established that the miner's presumed total disability or death did not arise at least in part from pneumoconiosis. The only explicit reference to a "disability causation" inquiry in SSA's rule appears in section 410.490(b)(3), and that section applies only if the claimant is proceeding on the basis of PFTs. It does not make a great deal of sense to conclude that paragraph (b)(3) requires pre-invocation proof of disability causation for a claimant with qualifying PFTs.[34] It is more likely that the

---

[33] The Benefits Review Board reached this same conclusion. *Soloe v. Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 1-125, 1-126 (Ben. Rev. Bd. 1987). The Fourth Circuit's contrary conclusion in the instant cases is devoid of any consideration of the relevant plain language of the two presumptions.

[34] If, in the case of qualifying PFTs, the claimant must also prove disease causation under section 410.490(b)(2) and disability causation under section 410.490(b)(3), the only thing presumed is that the miner is totally disabled, which is then subject to rebuttal under section 410.490(c). This approach, however, is logically flawed because a person needing to prove the cause of a total disability would first need to prove the existence of a total disability before identifying its cause. Thus, nothing is really presumed and the presumption would have no meaning. Looking at the original text of the proposed sections 410.490(b)(2) and (3), 37 Fed. Reg. 18,013 (Sept. 2, 1972), it seems that what SSA intended to accomplish was to link section 410.490(b)(1)(i) to (b)(2) and to link (b)(1)(ii) to (b)(3) for purposes of settling the disease causation issue pre-invocation. SSA's drafting error, if there is one, lies in its failure to specify that (b)(2) applies only to (b)(1)(i) proof.

disability causation inquiry is a rebuttal matter under section 410.490(c), that is subject to the criteria discerned by following the cross-references in paragraph (c).

In the SSA rule, both rebuttal criteria end with the direction to "see § 410.412(a)(1)." 20 C.F.R. § 410.490(c)(1), (2). The language of section 410.490(c)(1) and (2) is largely definitional. It briefly and incompletely states, within an evidentiary context, the 1972 version of the statutory definition of "total disability." Pub. L. 92-303, Sec. 4, 86 Stat. 153 (1972).[35] Under the 1972 Act, the Secretary of HEW was obligated to define the term total disability by regulation with reference to several statutory criteria. These mandatory criteria include requirements that (1) pneumoconiosis must be the reason the miner cannot work, (2) the disability must prevent the miner from working in his regular mining job, and (3) the disability must also prevent the miner from doing any other job requiring comparable skills and abilities.

The concepts reflected in the statutory terms are defined in detail in SSA's permanent rules beginning with 20 C.F.R. § 410.412 which is entitled " 'Total disability' defined." It is perfectly natural to assume that the references in section 410.490(c) to section 410.412(a)(1) were put there to give more detailed meaning to the provisions of section 410.490(c). Paragraph (a)(1) of section 410.412 again restates the statutory definition describing the general effect pneumoconiosis must have in order to support

---

The ten year requirement in paragraph (b)(3) in light of the fifteen year requirement in paragraph (b)(1)(ii) is inexplicable.

[35] The 1972 version provides "the term 'total disability' has the meaning given it by regulations of the Secretary of [HEW], except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. . . ." 86 Stat. 153 (1972).

an award of benefits. Section 410.412(a)(1) then directs the reader to "§§ 410.424-410.426." These rules are entitled "Determining total disability: Medical criteria only" and "Determining total disability: Age, education and work experience criteria." Section 410.426(a) thus finally states SSA's disability causation standard. It provides:

> A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered.

20 C.F.R. § 410.426(a).

Since section 410.490 contains no explicit disability causation standard, it is logical to conclude that the one contained in the cross-referenced material applies. This appears to be the way SSA wrote regulations in 1972. If the cross-reference is ignored, or its plain meaning is denied, one may assume that SSA wrote its interim presumption in deliberate disobedience of the command of the 1972 version of section 902(f) requiring SSA to write regulations defining "total disability" to include a causation standard attaching the total disability to pneumoconiosis. It is not likely that SSA overlooked this critical element, and the cross-references indicate that it did not.

When DOL incorporated a disability causation test into its rebuttal provisions,[36] the standard was liberalized from

[36] It is not significant to this analysis that DOL's second rebuttal method like SSA's second method also cross-references section 410.412(a)(1). The group of provisions brought into play by the cross-reference theoretically include SSA's total disability criteria as well as SSA's disability causation standard. The total disability criteria are relevant in a DOL adjudication even if the disability causation standard is superseded in DOL's new third rebuttal provision. To limit any confusion, DOL's interim presumption also includes a caveat stating, "Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section." 20 C.F.R. § 727.203(c). Part 718, at the time of promulgation of DOL's presumption merely incorporated 20 C.F.R. §§ 410.401-410.476. 38 Fed. Reg. 16,966 (1973). Since SSA's primary reason rule is inconsistent with DOL's section 727.203(b)(3), the SSA provision is not included in the incorporation by reference because DOL provided otherwise.

SSA's "primary reason" approach[37] to the "in whole or in part" test in 20 C.F.R. § 727.203(b)(3). DOL's disability causation rebuttal rule is clearly less restrictive than SSA's.

It cannot be argued that SSA's rules present a neat package. They are poorly drafted, circular, ambiguous, and at points unintelligible.[38] In adapting section 410.490 to the adversarial context of Part C, DOL made a reasonable effort to clarify the confusion and design a logical system for the determination of DOL claims subject to the interim presumption. In many respects, DOL's approach is more favorable to claimants. In no respect, other than the one identified in *Pittston Coal Group* is DOL's system demonstrably more restrictive than SSA's. DOL's attempt to enhance the clarity of SSA's criteria does not produce more restrictive criteria and does not surpass the limits of 30 U.S.C. § 902(f)(2).

[37] There are only a handful of reported decisions involving an attempt by SSA to rebut its presumption. In one case in which SSA's interim presumption was invoked by chest x-ray evidence, SSA appears to have argued in favor of a denial of benefits on the grounds that the miner's "disability is due primarily to heart disease not pneumoconiosis." *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 286 (6th Cir. 1983).

[38] The SSA interim presumption contains no rebuttal provisions for application in the claim of a survivor of a miner alleging that the miner's death was due to pneumoconiosis. *But see Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975) (affirming SSA's rebuttal of the section 410.490(b) presumption in a survivor's claim) ("If the Secretary had intended to provide for a rebuttal of the presumption only in the instance of living miners he doubtless would have so stated in more precise terms.").

B. DOL's Blood Gas Presumption Does Not Violate Section 902(f)(2)

Central to the holding in *Pittston Coal Group* is the axiom that the Secretary of Labor is prohibited by 30 U.S.C. § 902(f)(2) from making it more difficult for a claimant to obtain presumptive entitlement than was the case under SSA's rules. *Pittston Coal Group*, 488 U.S. at 117. DOL was not similarly prohibited from making it easier for a claimant to obtain this advantage. If, however, DOL elected to make its criteria less stringent, the agency was free to do so in any appropriate way so long as the restrictivity prohibition was observed.

SSA's interim presumption cannot be invoked by blood gas test evidence. 20 C.F.R. § 410.490(b). SSA's presumption can only be rebutted by blood gas evidence showing an absence of disability. *Id.* § 419.490(c)(2) (referencing physical performance tests). Under SSA's presumption, blood gas test results were used to deny, not approve, claims. SSA adopted a separate rule for the affirmative use of these tests. 20 C.F.R. Part 410, subpart D, Appendix.[39] Under the Appendix, a miner who independently proves the existence of pneumoconiosis acquires a rebuttable presumption of related total disability if blood gas test results meet published criteria. The presumption is rebutted by any "evidence rebutting such finding." *Id.*

DOL substantially liberalized this format by allowing presumptive entitlement solely on the basis of blood gas results coupled with ten years of employment.[40] 20 C.F.R.

---

[39] The "Appendix" is an appendix to Subpart D, not to section 410.490. *See* 20 C.F.R. § 410.424(a).

[40] DOL's blood gas table is also more favorable to claimants than is SSA's. By increasing the $p0_2$ value necessary to establish presumptive disability by 5 mm.Hg in each $pC0_2$ category, DOL's rule reduces the degree of impairment necessary to produce an assist for the claimant. In fact, several of the blood gas tests relied upon by the ALJ in invoking DOL's presumption in John Taylor's case would not demonstrate disability under SSA's Appendix.

§ 727.203(a)(3). No proof of pneumoconiosis or of the cause of abnormal test results is required. DOL's rule shifts to the defendant the burden of disproving what the claimant had to prove under SSA's Appendix. Measuring SSA's criteria against DOL's criteria in this regard fails to reveal any possibility that DOL's are more restrictive.

The court below thought it "a matter of indifference" how presumptive entitlement is conferred. 895 F.2d at 182. This is not a matter of indifference but of the statutory limits set by the restrictivity prohibition of section 902(f)(2). Under SSA's "criteria" presumptive entitlement is not available on the basis of blood gas evidence, and there is no basis on which to apply SSA's rebuttal criteria, whatever they provide. The statutory baseline in section 902(f)(2) is SSA's criteria, not a mix and match exercise. For this reason alone, the Fourth Circuit's invalidation of 20 C.F.R. § 727.203(b)(3), (4) in Taylor's case must be reversed.

II.

THE BLACK LUNG BENEFITS ACT PROHIBITS DOL FROM MANDATING AN AWARD WHERE IT IS PROVEN THAT THE MINER DOES NOT HAVE PNEUMOCONIOSIS OR ANY RELATED DISABILITY

If SSA's criteria standing alone do not speak with sufficient clarity to validate DOL's effort to comply with 30 U.S.C. § 902(f)(2), then the Black Lung Benefits Act itself conclusively accomplishes this result. The language of the Act is ultimately controlling, and this language cannot accommodate the conclusions reached by the Fourth Circuit. The Act provides abundant guidance at two levels. First, its specific provisions forbid an award of benefits where total disability or death due to pneumoconiosis is demonstrably absent, and second, its provisions as a whole limit the meaning of the word "criteria" within this mandate.

In *Pittston Coal Group*, this Court held that the word "criteria" in section 902(f)(2) is a broad, general term that does not readily submit to the limitations on its meaning suggested by the Secretary of Labor. 488 U.S. at 115. However broad or general the term may be, it is still a part of a statutory scheme with a specific purpose, and its logic and meaning must be interpreted in that context. " '[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Dole v. United Steelworkers' of America*, 110 S. Ct. 929, 934 (1990) (quoting *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

The Act begins with a statement of congressional findings and purposes. It provides in part:

> It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease. . . .

30 U.S.C. § 901(a). The Act has no other stated purpose.

The "criteria" referred to in section 902(f)(2) must surely be criteria for determining whether a miner is totally disabled by or died due to pneumoconiosis. Criteria that are incapable of discerning these facts or that ignore them do not fit very well. That is the clear import of section 902(f). Section 902(f)(1) authorizes the Secretary of HEW and the Secretary of Labor to write regulations defining the term "total disability" for their respective agencies. This authorization is followed by a list of requirements that must be reflected in the regulations. First among these is a proviso stating:

> [I]n the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in [comparable and gainful employment].

Id. § 902(f)(1)(A). Proviso D mandates the development of medical test criteria "which accurately reflect total disability in coal miners as defined in subparagraph (A) [that is, total disability due to pneumoconiosis]." *Id.* § 902(f)(1)(D).

Section 902(f)(2) completes the list of requirements directing DOL to employ special criteria for certain claims that are not more restrictive than those adopted by SSA. The natural reading of section 902(f)(2) in light of section 902(f) as a whole is that the criteria mentioned in section 902(f)(2) are criteria for determining total disability due to pneumoconiosis.[41] This Court generally follows the principle of construction requiring the attribution of related meaning to statutory requirements grouped in a list. *Massachusetts v. Morash*, 109 S. Ct. at 1673. There is no reason to depart from the general rule here.

In the sections of the Act governing SSA's program, the exclusive focus on total disability or death due to pneumoconiosis is repeated over and over again. *See, e.g.*, 30 U.S.C. § 921(a) (directing the payment of benefits only on

---

[41] Strictly construed, section 902(f)(2) does not require the Secretary of Labor to adopt criteria that are not more restrictive than SSA's for claims predicated upon an alleged death due to pneumoconiosis. While both SSA's and DOL's interim presumptions benefit a survivor whose claim is predicated upon an allegation of death due to the disease, neither section 902(f)(2) nor any other provision specifically requires DOL to follow SSA's pattern for this purpose. A natural reading of section 902(f)(2) limits the reach of the restrictivity prohibition to "total disability" criteria only. A survivor whose claim is predicated upon an allegation that the miner was totally disabled by pneumoconiosis at the time of death would, however, benefit from section 902(f)(2). *See* 30 U.S.C. §§ 901(a), 902(f)(1)(B).

account of total disability or death due to pneumoconiosis); *id.* § 922 (prescribing the amount of benefits payable on account of total disability or death due to pneumoconiosis). The Secretary of HEW did not in 1972, or at any other time have regulatory authority to write criteria providing benefits beyond the scope of these provisions. By the same token, there is no reason to assume that the Secretary actually did so.

Section 422 of the Act, 30 U.S.C. § 932, describes the rights and obligations of mine operators.[42] Of particular significance is paragraph (c) of this section which provides in relevant part:

> [N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such operator.

Id. § 932(c). DOL's interim presumption rebuttal sections 727.203(b)(3) and (b)(4) are perfectly in accord with this statutory mandate, and there is no indication anywhere that it is overridden by the terms of section 902(f)(2). Although section 902(f)(2) was enacted after section 932(c), the provisions should and easily may be construed harmoniously. *See Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

---

[42] Congress, throughout the history of the program, expected the states to fold the federal black lung provisions into their respective state workers' compensation laws. *See* 30 U.S.C. § 931. The Secretary of Labor is directed to exempt any state from the federal program if the state's workers' compensation law provides adequate coverage for total disability or death due to pneumoconiosis. *Id.* § 931(b)(2)(A). If Congress intended to require the payment of benefits in many cases even if the record proved the absence of pneumoconiosis or related disability or death, no state could even theoretically comply, and the enactment of the section would have been pointless.

It is also significant that the Act requires the adjudicator to give due consideration to all relevant evidence:

> In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history. . . .

30 U.S.C. § 923(b).[43] This Court has held that the mandate of section 923(b) is satisfied "[a]s long as relevant evidence will be considered at some point by the ALJ . . . ." *Mullins Coal Co.*, 484 U.S. at 150. Invocation of either the SSA or DOL interim presumption may be accomplished after consideration of only one of the types of relevant evidence listed.[44] The rest of the relevant evidence is relevant, generally, only in the rebuttal inquiry. In the case of PFTs and ABG studies, relevance may differ depending upon whether the study results are being used to invoke the presumption or rebut it.[45] The leftover evidence may be highly relevant for determining whether the miner has pneumoconiosis, is disabled due to the disease, or died due to the disease. If the Fourth Circuit is correct in its conclusion that rebuttal is unavailable in light of proof that the miner does not suffer from pneumoconiosis or related

---

[43] While this provision appears within Part B, it was a part of 1972 amendments to the Act that must also apply in Part C claims. 30 U.S.C. § 940.

[44] In a case decided under SSA's rule, other parts of the record may also be relevant in the pre-invocation phase (*e.g.*, proof of disease causation). 20 C.F.R. § 410.490(b)(2), (3). Even under the SSA rule, however, there will always be additional elements of the entitlement inquiry that are not resolved at the point of invocation (*e.g.*, disability causation).

[45] In the invocation phase, the studies are reviewed only to determine whether published invocation values are met. 20 C.F.R. §§ 410.490(b)(1)(ii); 727.203(a)(2), (3). In the rebuttal phase, the studies assist the reporting physicians in determining whether, in fact, the miner is or was totally disabled due to pneumoconiosis.

disability, much of the specific types of evidence that Congress directed black lung adjudicators to consider may not be considered at all.

As a matter of statutory interpretation, the word "criteria" in section 902(f)(2) may not be divorced from the Act as a whole. There is no rule of construction that permits the word to be treated as the equivalent of a computer virus that countermands all other instructions bringing disorder where an orderly pattern was intended.[46] The Act affirmatively obligates mine operators to pay benefits only on account of total disability or death due to an occupational disease that was caused in part by the miner's employment with the operator. If, for good reason, Congress deems it appropriate to reallocate traditional burdens of proof to make it easier for a claimant to obtain benefits, it is certainly appropriate for Congress to design the entitlement scheme with this objective in mind. It does not follow, however, that any interpretation of the statute benefitting claimants is proper. *See Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

---

[46] It is noted in *Pittston Coal Group*, "that Congress had no particular motive in preserving the HEW interim medical criteria other than to assure the continued liberality of black lung awards. . . . [T]here is no apparent reason for giving the unqualified word 'criteria' the unnaturally limited meaning the Secretary suggests." 488 U.S. at 116. This reasoning cannot also sustain the Fourth Circuit's invalidation of DOL's rebuttal rules. The meaning reflected in DOL's rebuttal rules is derived expressly and precisely from the Act. The Act sets the limits and those limits are essential to the viability and rationality of the program. Liberality alone, and that is virtually all there is to support invalidation of 20 C.F.R. § 727.203(b)(3) and (4), cannot carry this case by itself and leads to the unnatural result. *See Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635-36 (1983) (workers' compensation laws reflect a legislatively settled compromise between the employer and employee, and the remedial purposes of such laws do not substitute for traditional methods of interpretation).

"Statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). This is a proper rule to apply here. The Fourth Circuit's belief that a mine operator cannot defend any black lung disability claim by proving that the miner does not have the disease or related disability is not reasonable and has no support whatever in the statute. The Secretary of Labor was compelled by the Act to permit rebuttal of the presumption written to comply with section 902(f)(2), if it is proven that the miner does not suffer from black lung disease or related disability.

The legislative history of the 1977 amendments adds little to the discussion. It serves mainly to explain the general absence of reported SSA rebuttal litigation and to express Congress's intent that DOL properly validate claims, a job that was not accomplished by SSA. There is no statement or recognition in the extensive legislative record to confirm the Fourth Circuit's conclusion that SSA's interim presumption could not be rebutted by the third and fourth methods prescribed in DOL's rule. There is no statement that rebuttal by these methods was, or should have been, precluded. There is no indication that DOL was expected to eliminate disease or disability causation as elements in any case.[47]

The legislative record shows that SSA made little or no effort to litigate questionable claims and did not assume an adversary's role. *See supra* 12. There is no indication that SSA precluded itself in its rules from meaningfully contesting claims, only that the agency made the choice,

---

[47] Several bills considered but rejected the adoption of irrebuttable presumptions or entitlements solely on the basis of many years of coal mine employment. *See, e.g.*, H.R. 7, 94th Cong., 1st Sess. § 3(a) (1975); H.R. 10760, 94th Cong., 1st Sess. § 2(a) (1975). These proposals did not contemplate direct mine operator involvement in the adjudication or payment of claims.

for whatever reason, not to do so. The record also clearly expresses Congress's expectation that DOL, in the design of its interim presumption, and otherwise, would do a better job. In this regard, the Conference Committee ordered DOL to write an interim presumption and design a system of adjudication in which "all relevant medical evidence shall be considered." H.R. Rep. No. 864, *supra* p. 13, at 16. DOL surely could not achieve this objective if it wrote an interim presumption mandating indifference to medical evidence proving that the miner did not even have black lung disease. There is, in sum, nothing in the record to undercut the validity of DOL's rebuttal rules and some strong indications that DOL regulated as was expected.

III.

DOL'S REBUTTAL RULES DESERVE JUDICIAL DEFERENCE

The Secretary of Labor is authorized by the Act to write regulations, including interim criteria, for the adjudication of all DOL claims. 30 U.S.C. § 902(f)(1), (2), 932(b), 936(a). DOL's regulations erect the required presumptions and, in simple, logical fashion, permit the rebuttal of the facts that are presumed. In so doing, the Secretary's rules require the denial of a claim if it is proven that the miner does not or did not have pneumoconiosis or is not disabled or did not die due to this disease. These rules reflect the Secretary's understanding of his statutory mission.

This Court's standard of review of the validity of the agency's interpretation of a statute it administers is now fairly well established:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction .... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1987) (footnotes omitted).

In the Black Lung Benefits Act, Congress has spoken fairly clearly. The Act precludes the assignment of liability to a mine operator absent a connection between employment, disease and related disability or death. 30 U.S.C. § 932(c). Congress also stated that "total disability" in this law means total disability due to pneumoconiosis, *id.* § 902(f)(1)(A), and that all the elements in the entitlement inquiry must be reviewed in light of all relevant evidence, *id.* § 923(b). DOL's rebuttal rules are, by all appearances, perfectly consistent with the words of the Act. The word "criteria" in section 902(f)(2) does not carry enough force to change this conclusion. At very best, it leads the reader to the intricacies of section 410.490, which easily submit to a reading that is fully consistent with the terms of sections 727.203(b)(3) and (b)(4). *See supra* pp. 25-31. At its worst, section 410.490 presents an unfortunately ambiguous and poorly designed set of criteria defying any precise analysis.

In the end, however, the Secretary of Labor's election to construe SSA's criteria so that they are fully consistent with the plain language of the Act cannot be persuasively faulted and plainly deserves judicial deference.[48]

---

[48] Traditional deference makeweights are all present. DOL's rebuttal

IV.

30 U.S.C. § 902(f)(2) VIOLATES THE DUE PROCESS RIGHTS OF MINE OPERATORS IF IT COMPELS LIABILITY FOR DISABILITY OR DEATH IN WHICH THE MINE OPERATOR IS NOT INVOLVED

This Court does not often or readily find fault with economic regulatory legislation in light of the Due Process Clause. A reasonable interpretation of 30 U.S.C. § 902(f)(2) avoids the need to determine whether it is among the rare exceptions to the rule. If, however, section 902(f)(2) is construed to impose mandatory black lung liability on a mine operator for disease, disability, or death that is demonstrably unrelated to the miner's employment with the operator, a legitimate due process question is presented.[49]

rules have been in place since 1978, and were not directly challenged in litigation until after the decision in *Pittston Coal Group*. DOL's rules were promulgated shortly after enactment of 30 U.S.C. § 902(f)(2) as part of the 1977 amendments, and DOL personnel were very much involved in the evolution and drafting of the amendments.

[49] In responding to the petitions for certiorari, both Taylor and Dayton argued that the due process concern raised here was not properly raised in the Fourth Circuit. This is incorrect. Taylor's original petitioner's brief to the Fourth Circuit did not raise the section 410.490 issue. The matter was later raised in a perfunctory way in Taylor's Supplemental Brief. After the Fourth Circuit adopted the theory of the Supplemental Brief, Clinchfield's petition for rehearing squarely challenged the constitutionality of the Fourth Circuit's interpretation. Respondent's Petition for Rehearing at 12-14, *Taylor v. Clinchfield Coal Co.*, *supra*. The Government directly raised the question in *Dayton*, and notwithstanding the Fourth Circuit's refusal to consider a constitutional question raised by the Government, there is no apparent authority prohibiting the Government from doing so. The Government as administrator of a program would not, it seems, be in the same position as a private party seeking to assert the constitutional rights of others. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). In the setting presented, DOL has a legitimate recognizable interest in preserving the fairness and integrity of a program it administers. *See* 30 U.S.C. § 932(k). The writs of certiorari granted in these two cases are not limited and both petitions for certiorari seek direct review of the constitutional validity of 30 U.S.C. § 902(f)(2), as a final resort.

The longstanding test for determining the validity of civil presumptions under the Due Process Clause is clearly articulated. For the presumption to pass constitutional muster,

> "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

Usery v. Turner Elkhorn Mining Co., 428 U.S. at 28 (quoting *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)). If the evidentiary device merely shifts the traditional burden of proving certain facts from one party to another, it is fairly certain that the legislature's election to do so will pass the test in a civil law setting.

Where, however, the device also "curtails the factfinder's freedom to assess the evidence independently," some reasonable basis for precluding inquiry into the truth is required. *See County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979). The requisite rational basis might be found in the strength of the connection between elemental and ultimate facts, *id.*, or it might be apparent if the operation and effect of the statute is clearly within the bounds of reason. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 22-26. Section 902(f)(2) as read by the court below reveals neither a strong connection between proven facts and the mandatory conclusions suggested nor a permissible operation and effect.

No matter how easy it may be to satisfy the requirements of the Due Process Clause, the Fourth Circuit's interpretation of 30 U.S.C. § 902(f)(2) is very troubling. This Court has already noted:

> [O]nly the first of the four alternative methods of invoking the [DOL] presumption requires proof

> that the claimant's disease is in fact pneumoconiosis. None of the methods requires proof of causation, and only the fourth requires proof of total disability.

Mullins Coal Co., 484 U.S. at 143. It is clear that abnormal chest x-rays may not detect occupationally related disease.[50] PFTs are not diagnostic of occupational disease, and the levels set for invocation are designed specifically to give the benefit of presumptive entitlement to reasonably healthy, older miners.[51] Blood gas test results are also not diagnostic, and abnormal results may be due to a wide variety of temporary or permanent illnesses, the altitude of the test facility, and even the personal habits of the person being tested.[52] A credible and well documented medical opinion establishing a totally disabling respiratory impairment may identify a condition with no relationship whatever to coal mining.

In no instance is the connection between invocation facts and presumed ultimate facts very strong and most often there is no scientifically verifiable connection at all.[53] If the operator is required to pay benefits solely on the basis

---

[50] *See supra* note 31. This Court has also noted, "Simple pneumoconiosis [the level of disease present in the vast majority of cases in which the x-rays are positive, including Mr. Pauley's case] . . . is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 7.

[51] *See supra* note 19.

[52] *See supra* note 20.

[53] The statutory irrebuttable presumption reviewed in *Usery v. Turner Elkhorn* is a very different matter. *See* 30 U.S.C. § 921(c)(3). This presumption is available only if the proof demonstrates "complicated" pneumoconiosis, the most severe and advanced stage of the disease. *Usery*, 428 U.S. at 7-8. But even in this connection, the Court was wary of the retroactive application of the presumption where, for example, the miner died from an unrelated condition and was unaffected by his disease. *Id.* at 26.

of PFTs or blood gases meeting the tables, and is deprived of a meaningful right to put on any relevant proof showing that it has not caused the disease, disability or death of the miner, the result is quite likely to be purely arbitrary. The result mandated by the court below in Taylor's and Dayton's cases is purely arbitrary.

Clinchfield caused no harm to Taylor and Consol caused none to Dayton. It is purely arbitrary to make the mine operator the insurer of last resort for Taylor's obesity and cigarette smoking, Dayton's cigarette smoking and his decision to leave coal mining, or for that matter, Mr. Pauley's arthritis and stroke. The constitutional concern "lurking beneath the surface" in *Mullins Coal Co.*, 484 U.S. at 159 n.32, rises to surface in this setting. It is no different, as a practical matter, to prohibit the operator from proving that the miner does not have pneumoconiosis or related disability in the rebuttal phase, than it is to preclude the mine operator from challenging the reading of an x-ray in the invocation phase. In either case, the opportunity to defend is severely damaged or lost entirely, the truth becomes irrelevant, and our system of justice is poorly served. *See Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1643 (1986).

If the Due Process Clause has any meaning in a substantive civil context where economic rights are at stake, that meaning should restrain Congress from directly redistributing the property of one party to another without any valid reason. Perhaps an employment relationship, even a fairly short one, may be enough of a reason and it does not matter whether the redistribution is called black lung benefits or something else. It is suggested, however, that when Congress writes a law to provide black lung benefits to be paid by employers, it is not constitutionally good enough to design the law to disguise a vastly larger objective[54] that can only be achieved by denying the

---

[54] Information obtained indirectly from DOL indicates that the number

defendant any reasonable opportunity to defend. In the Black Lung Benefits Act, Congress did not write a life insurance, general disability insurance, general health insurance, retirement or unemployment program for coal miners and their families. Mine operators did not and had no reason to fund any such program. Congress should not be able to realize its hidden agenda, if it had one, consistent with constitutional principles, by effectively depriving the operators of their day in court.

These cases bring this Court face-to-face with a truly arbitrary mandate. The mine operators have been ordered, by virtue of 30 U.S.C. § 902(f)(2), to pay black lung compensation to two former employees who have not been harmed at all as a result of their employment. The holding is generic and will affect thousands of cases. This result is surely not in keeping with the language, spirit or purpose of the Due Process Clause.

---

of claims potentially affected by this case range from 3,000 to 7,000. The Solicitor General anticipates a volume toward the lower end of this range. With indemnity benefits, health care costs and interest on past due liabilities, the cost of these claims could easily top $1 billion. Most of this liability was unanticipated and is unfunded under current arrangements.

CONCLUSION

The judgments of the Fourth Circuit should be reversed. The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Of Counsel:
JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., NW
Washington, D.C. 20006

* *Counsel of Record for the Clinchfield Coal Company*

** *Counsel of Record for the Consolidation Coal Company*

Supreme Court, U.S.
FILED
JAN 16 1991
CLERK

(11) (9) (9)

Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

BRIEF FOR RESPONDENT ALBERT C. DAYTON (No. 90-114)

THOMAS R. MICHAEL
(Counsel of Record)
MICHAEL & KUPEC
228 Court Street
Clarksburg, West Virginia 26301
(304) 623-6678

Attorney for Respondent
ALBERT C. DAYTON (No. 90-114)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" and presence of pneumoconiosis rebuttal tests at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) violate the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who meet the invocation requirements of the Department of Health, Education, and Welfare ("HEW") interim provision at 20 C.F.R. § 410.490(b) by ventilatory study evidence?

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing "disability causation" and presence of pneumoconiosis factual inquiries for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment to the United States Constitution?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL INTERIM REGULATION'S REBUTTAL TESTS AT §§ 727.203(b)(3) AND (b)(4) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION BY VENTILATORY STUDY EVIDENCE	10
A. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) and (b)(4) Set Forth More Restrictive Criteria Than The Criteria In The HEW Interim Provision	10
1. The HEW Interim Provision's Rebuttal Tests At §§ 410.490(c)(1) And (c)(2) Do Not Implicitly Incorporate Any Rebuttal Test Like That At § 727.203(b)(3) Or (b)(4)	12

	PAGE
2. The Invocation Subparagraphs Of The HEW Interim Provision At §§ 410.490 (b)(2) And (b)(3) Do Not Authorize Any Factual Inquiries Like The Ones That The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Authorize	14
a. The Text Of The HEW Interim Provision	15
b. HEW's Contemporaneous Interpretation Of Its Interim Provision And The Case Law	25
c. The Circumstances Attending Adoption Of The HEW Interim Provision	26
B. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Violate Section 402(f)(2) Of The Act	29
C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference	38
II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION	44
CONCLUSION	47

TABLE OF AUTHORITIES

CASES: PAGE(S)

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) 41

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 45

Batterton v. Francis, 432 U.S. 416 (1977) 33

Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley, 890 F.2d 1295 (3rd Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 89-1714) 13

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 7, 32, 40

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 33, 40

Department of Treasury v. FLRA, 837 F.2d 1163 (D.C. Cir. 1988) 38

Dole v. United Steelworkers of America, 110 S. Ct. 929 (1990) 37

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) 43

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 7, 39

Lawn v. United States, 355 U.S. 339 (1958) ... 45

Motor Vehicle Mgrs. Assoc'n v. State Farm Mut. Auto Ins., 463 U.S. 29 (1983) 44

Manning v. Family Publications Service, 411 U.S. [illegible] 1973) 46

Mullins Coal Co. v. Director, O.W.C.P., 484 U.S. 135 (1987) 10, 25, 26, 33

PAGE(S)

NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112 (1987) 39

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 5, 8, 10, 17-21, 26, 29-31, 38, 39, 43

Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1978) 25

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ... 41

Strike v. Director, O.W.C.P., 817 F.2d 395 (7th Cir. 1987) 43

Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696) 36

Udall v. Tallman, 380 U.S. 1 (1965) 38

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 8, 31, 33, 35, 46, 47

Weinberger v. Salfi, 422 U.S. 749 (1975) 46

Youakim v. Miller, 425 U.S. 231 (1976) 45

CONSTITUTIONAL PROVISION AND STATUTES:

U.S. CONST. amend. V ..... i, 1, 9, 44

Black Lung Benefits Act of 1972, Pub. L. 92-303, 86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988):

§ 401(a), 30 U.S.C. § 901(a) 1, 37, 38, 43
§ 402(b), 30 U.S.C. § 902(b) 25, 27, 30
§ 402(f), 30 U.S.C. § 902(f) 1, 29
§ 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A) 5, 30, 37, 38
§ 402(f)(2), 30 U.S.C. § 902(f)(2) .....
..... i, 3, 5-10, 12, 29-32, 34-40, 42-47

PAGE(S)

§ 411(c), 30 U.S.C. § 921(c) 43
§ 411(c)(1), 30 U.S.C. § 921(c)(1) 31, 35
§ 411(c)(3), 30 U.S.C. § 921(c)(3) 46
§ 411(c)(4), 30 U.S.C. § 921(c)(4) 31, 35
§ 413(b), 30 U.S.C. § 923(b) 31, 36, 37, 43
§ 422, 30 U.S.C. § 932 ..... 31, 35
§ 422(c), 30 U.S.C. § 932(c) 1, 7-8, 35, 36, 45, 46
§ 422(j), 30 U.S.C. § 932(j) 1, 35

26 U.S.C. § 9501(d)(1) 1
26 U.S.C. § 9501(d)(1)(B) 35
30 U.S.C. § 902(b) (1970 & Supp. II 1972) 25, 27

Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95 (1978) 27

REGULATIONS:

20 C.F.R.:

Part 410:

§ 410.412 1
§ 410.412(a)(1) 13, 41
§ 410.414(b) 22, 23
§ 410.414(b)(3) 22
§ 410.414(b)(4) 22, 34
§ 410.416 ..... 15-21, 27
§ 410.456 ..... 15-21, 27
§ 410.490 ..... 1, 3, 8, 18, 22, 39-41
§ 410.490(b) ..... i, 10, 11, 15, 16, 21, 23, 25
§ 410.490(b)(1) 15, 16, 19, 21, 25
§ 410.490(b)(1)(i) 1, 8, 15, 16, 19, 26, 27
§ 410.490(b)(1)(ii) 1, 4, 9, 19-24, 27, 29, 34
§ 410.490(b)(2) 4, 5, 14-21, 24-27, 40, 41
§ 410.490(b)(3) 4, 5, 10, 14, 18-26, 29
§ 410.490(c) 4, 10, 11, 16, 18, 24, 41
§ 410.490(c)(1) 4, 10, 12, 13, 26, 29, 41
§ 410.490(c)(2) 4, 10, 12, 13, 26, 29, 41

PAGE(S)

Part 718:

§ 718.3(c) 39

Part 727: 42

§ 727.200 ..... 42, 44
§ 727.203 ..... 1, 42
§ 727.203(a) 10
§ 727.203(a)(2) 2, 24
§ 727.203(b) 8, 10
§ 727.203(b)(1) 10
§ 727.203(b)(2) 2, 3, 10
§ 727.203(b)(3) ..... i, 3, 5, 9-14, 17, 29, 34, 44, 46
§ 727.203(b)(4) ..... i, 2-5, 9-14, 17, 29, 34, 44, 46

37 Fed. Reg. 20634 (1972) 21-22
43 Fed. Reg. 17766 (1978) 41
43 Fed. Reg. 36818-31 (1978) 42
43 Fed. Reg. 36826 (1978) 41
45 Fed. Reg. 13683 (1980) 28

Coal Miner's Benefits Manual (Part IV) ... 13, 22, 25, 39

§ IB3(b) 22, 23, 34
§ IB3(b)(4) 22, 34
§ IB6 22
§ IB6(c) 25, 26
§ IB6(c)(1) 25
§ 1B6(c)(1)(B) 23
§ IB6(c)(2) 25
§ IB6(d) 22-24, 26, 34
§ IB6(e)(3) 25

LEGISLATIVE MATERIALS:

S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 33, 34
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 39

PAGE(S)

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 36

Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. (1973) .. 20

MISCELLANEOUS:

Briefs and Appendix—

Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley, 890 F.2d 1295 (3d Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 89-1714)

Brief of the Federal Respondent (3d Cir.) . 13, 41

Brief for the Petitioner Bethenergy Mines, Inc. (3d Cir.) 13

Brief for Petitioner Harriet Pauley (No. 89-1714) (U.S. Supreme Court) 1, 9, 13, 19, 20, 27-29, 31-33, 35-38, 45, 46

Dayton v. Consolidation Coal Co. v. Director, O.W.C.P., 895 F.2d 173 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-114)

Brief of the Federal Respondent (4th Cir.) 11, 35, 36, 41

Brief of Respondent Consolidation Coal Co. (4th Cir.) 11

[Director, O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc (4th Cir.) 12, 17, 18, 41

PAGE(S)

Halon v. Director, O.W.C.P., 713 F.2d 30 (3d Cir. 1982), *reinstated by Halon v. Director, O.W.C.P.*, 713 F.2d 21 (3d Cir. 1984)

Brief for the Respondent Director (3d Cir.) . 43

Petition for Rehearing on Behalf of the Director, O.W.C.P (3d Cir.) 43

Taylor v. Clinchfield Coal Co. and Director, O.W.C.P., 895 F.2d 178 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-113)

Brief of the Appellee [Clinchfield Coal Co.] (4th Cir.) 11

Respondent Director's Petition for Rehearing and Suggestion for Rehearing En Banc (4th Cir.) 12

Clinchfield Coal Co.'s Petition for Rehearing (4th Cir.) 12

Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696)

Appendix to Petition for Certiorari (U.S. Supreme Court) 36

Other—

M. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W.Va. L. Rev. 869 (1981) 41

Stedman's Medical Dictionary (24th ed. 1982) . 27

Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

BRIEF FOR RESPONDENT ALBERT C. DAYTON (No. 90-114)

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c),(j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727.203. 89-1714 App. 1-13 sets forth each of these provisions.[1]

STATEMENT

A. Statutory And Regulatory Background

Petitioner Harriet Pauley in No. 89-1714 reviews the statutory and regulatory background relevant to this case, except for the operation of the HEW interim provision at 20 C.F.R. § 410.490 here,[2] where the miner Albert Dayton invoked the presumption that provision confers by ventilatory study evidence under § 410.490(b)(1)(ii).[3] We discuss the operation of the HEW interim provision in "ventilatory study cases" such as this one in Argument § I.A *infra*.

B. This Litigation

Albert Dayton applied for black lung benefits in 1979 after working for 17 years as a coal miner. (Pet. App.

---

[1] The "89-1714 App." is the Appendix to the Brief for Petitioner Harriet Pauley in No. 89-1714, with which this case and No. 90-113 are consolidated. Citations to "Pet. App." are to the Appendix to Consolidation Coal Company's petition for certiorari herein.

[2] Like petitioner Pauley, we often refer to 20 C.F.R. § 410.490 as the "HEW interim provision," which is its popular name. Similarly, we often refer to 20 C.F.R. § 727.203 as the "DOL interim regulation." The numerous citations to various provisions of 20 C.F.R. usually omit the "20 C.F.R." citation.

Like petitioner Pauley as well, we refer to the Secretary of Labor and to the respondent Director, Office of Workers' Compensation Programs (the "Director") interchangeably.

[3] In contrast, John Pauley, the miner in No. 89-1714, invoked the HEW presumption by x-ray evidence under § 410.490(b)(1)(i).

at 15) The Department of Labor initially approved his application, but Consolidation Coal Company, the responsible coal mine operator, contested this approval. (*Id.*)

A hearing was held before an Administrative Law Judge (ALJ). (*Id.* at 14-15) The record before the ALJ contained conflicting medical opinions on the questions of disability and the presence of pneumoconiosis. Mr. Dayton presented doctor's opinions that he had clinical pneumoconiosis and also that his respiratory and pulmonary impairment was caused by coal dust exposure. (*Id.* at 21) His treating physician concluded that he was totally disabled from coal mine employment, (*id.*), and that his disability was caused, in part, by his lung disease. (*Id.* at 24) Consolidation Coal Company, on the other hand, presented doctors' opinions that did not diagnose clinical pneumoconiosis and minimized the contribution of dust exposure to Mr. Dayton's lung disease. (*Id.* at 26-27) The company doctors also opined that Mr. Dayton's respiratory and pulmonary impairments were not totally disabling. (*Id.* at 22-24)

The ALJ concluded that Mr. Dayton invoked the DOL interim presumption under § 727.203(a)(2) based on his years of coal dust exposure and on the ventilatory studies of his lung function. (*Id.* at 15, 20) The ALJ found, however, that Mr. Dayton's respiratory impairment was not totally disabling and concluded that this finding established rebuttal of the presumption under § 727.203(b)(2). (*Id.* at 22-24) The ALJ also found that Mr. Dayton did not have pneumoconiosis and concluded that the presumption was rebutted under § 727.203(b)(4) as well. (*Id.* at 26)

Mr. Dayton appealed this decision to the Benefits Review Board, arguing that the ALJ's findings under §§ 727.203(b)(2) and (b)(4) were improper. (*Id.* at 10) Because the Board affirmed the ALJ's finding that Dayton did not have pneumoconiosis so that rebuttal under § 727.203(b)(4) was established (*Id.* at 10-12), the Board declined to decide the § 727.203(b)(2) issue. (*Id.* at n.1) The Board also rejected

Mr. Dayton's position that he was entitled to benefits under the HEW interim provision at § 410.490 because, in its view, the ALJ's finding that he did not have pneumoconiosis precluded such entitlement. (*Id.* at 12 n.2)

Mr. Dayton appealed the Board's decision to the Fourth Circuit, which held that § 727.203(b)(4) violates the "not . . . more restrictive" mandate of Section 402(f)(2) of the Act because the HEW interim provision does not contain a factual inquiry like the one § 727.204(b)(4) authorizes. (*Id.* at 4-5) The court remanded the case for consideration of rebuttal under § 410.490. (*Id.* at 7)[4]

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Dayton's using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires affirmance of the court of appeals' judgment.

A. In ventilatory study cases like Mr. Dayton's, the DOL interim regulation's "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4), respectively, set forth criteria that are more restrictive than the criteria of the HEW interim provision.

1. Unlike the DOL interim regulation, the HEW interim provision does not authorize benefit denials in ventilatory study cases based upon factual determinations adverse to the miner respecting either the cause of the

[4] Neither the Board nor the Fourth Circuit has yet addressed Mr. Dayton's positions that the ALJ used the wrong legal standards in evaluating the evidence under § 727.203(b)(2) and, if § 727.203(b)(4) is valid, under it. The Fourth Circuit never reached either of these issues, and the Board never reached the § 727.203(b)(2) issue. Consolidation has, therefore, incorrectly stated that the evidence establishes that Mr. Dayton is not totally disabled and does not have pneumoconiosis.

miner's total disability or whether he has pneumoconiosis. Rather, under the HEW interim provision, as it operates in ventilatory study cases, "disability causation" and the presence of pneumoconiosis are conclusively presumed when a miner proves, as Mr. Dayton did, that he has a chronic respiratory or pulmonary impairment, as shown by ventilatory study evidence meeting certain table values, and that he worked in the mines longer than ten years, §§ 410.490(b)(1)(ii), (b)(2), (b)(3), and his opponent is unable to prove that he is performing, or is able to perform, his prior coal mine work or its equivalent. §§ 410.490(c)(1), (c)(2). This understanding of the regulation gives every subsection of the HEW interim provision operative effect in ventilatory study cases. Most particularly, §§ 410.490(b)(2) and (b)(3) are properly understood as companion provisions in ventilatory study cases: a miner who meets the ten-year mining duration requirement of § 410.490(b)(3) thereby secures a presumption that the respiratory or pulmonary impairment shown by his ventilatory studies "ar[o]s[e] out of coal mine employment," § 410.490(b)(3), thus satisfying the causation requirement of § 410.490(b)(2).

2. In the court of appeals, both the Director and the coal companies in this case and in No. 90-113 advanced the argument that, through parenthetical cross-references in its rebuttal tests at §§ 410.490(c)(1) and (c)(2), the HEW interim provision implicitly incorporates additional rebuttal tests like §§ 727.203(b)(3) and (b)(4). In this Court, however, the Director has completely abandoned that contention, and the coal companies have abandoned it as a justification for § 727.203(b)(4). As petitioner Pauley explains in her brief in No. 89-1714, this § 410.490(c) cross-reference argument is completely without merit in any event.

3. The Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes "disability causation" and presence of pneumoconiosis factual inquiries like those at §§ 727.203(b)(3) and (b)(4). The coal companies advance a similar argument as to § 727.203(b)(4), relying variously on § 410.490(b)(2) or another *invocation* subparagraph of the HEW interim provision, § 410.490(b)(3). Under this new-found assertion, claimants in ventilatory study cases are supposedly faced with some sort of "pre-invocation" rebuttal inquiry into "disability causation" and the presence of pneumoconiosis. However, the text of the HEW interim provision itself, this Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), and HEW's contemporaneous interpretation of the provision, among other factors, all show that the assertion is wrong.

B. If this Court accepts our position that the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria the HEW interim provision sets forth, then affirmance of the judgment below is required because the "disability causation" and presence of pneumoconiosis criteria in §§ 727.203(b)(3) and (b)(4) are the types of "criteria" that Section 402(f)(2) says cannot be more restrictive in the DOL interim regulation than they are in the HEW interim provision.

1. As petitioner Pauley explains in her brief in No. 89-1714, this Court's decision in *Sebben* strongly supports reading the term "criteria" in Section 402(f)(2) to mean *all* criteria in the HEW interim provision, including its criteria for "disability causation" and the presence of pneumoconiosis, both of which, in ventilatory study cases, are conclusively presumed. And if the term "criteria" in Section 402(f)(2) is instead read as "total disability criteria," as this Court in *Sebben* suggested it might be, then the statutory definition of "total disability" in Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), which defines that term to include not only the severity of a miner's impairments but also both "disability causation" and the pres-

ence of pneumoconiosis, similarly obliges the conclusion that those two criteria are Section 402(f)(2) "criteria."

2. The Director suggests that the HEW interim provision in ventilatory study cases, read to presume conclusively "disability causation" and the presence of pneumoconiosis, would have violated the Act when it was promulgated. The Director points to several statutory provisions that authorize or require factual inquiries into "disability causation" or the presence of pneumoconiosis in Part B cases. These factors, among others, he says, make it "[un]reasonable" to conclude that the Congress that enacted Section 402(f)(2) believed that benefits could be awarded to claimants under Part B (and under the HEW interim provision in particular) absent factual inquiries into "disability causation" and the presence of pneumoconiosis. The coal companies advance similar arguments, but to no avail. In promulgating the HEW interim provision, the Secretary of HEW was exercising legislative authority that the statute granted her. And we adopt petitioner Pauley's extensive answer to the Director's reliance on the several provisions of the Act that authorize or require factual inquiries into "disability causation" or the presence of pneumoconiosis. Mrs. Pauley explains in her brief that the Director simply misreads some of the provisions he relies upon and that the reading he gives Section 402(f)(2), based on his interpretation of other provisions, would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2).

C. The Director's and the coal companies' companion pleas for deference to the Secretary of Labor's current interpretations of the HEW interim provision and Section 402(f)(2) are unavailing.

1. An agency's interpretations of its own regulations are generally entitled to considerable deference. However, so far as deference to the Secretary of Labor's interpretation of the HEW interim provision as a regulation is concerned, this general rule is inapplicable, as the HEW interim provision is not a Department of Labor regulation. Moreover, the Secretary of HEW's interpretation of that provision supports our position.

2. Deference to an administrative agency's construction of a statute is inappropriate if a court, "[e]mploying traditional tools of statutory construction," is able to discern Congress' intent in enacting the measure. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Here, those tools, principally the statutory text itself, do permit this Court to discern what Section 402(f)(2) and the HEW interim provision mean. Accordingly, and as in *Sebben*, the current interpretations of Section 402(f)(2) and the HEW interim provision that the Secretary proffers are not entitled to any deference.

3. The Secretary of Labor's current interpretations of both the HEW interim provision and Section 402(f)(2) are not ones that are contemporaneous with the enactment of Section 402(f)(2). Nor are they consistent with several prior interpretations the Secretary has advanced, including the interpretations she advanced in the court below. These factors independently make the Secretary's interpretations of the HEW interim provision and Section 402(f)(2) unworthy of deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988).

D. A coal operator who shows under Section 422(c) of the Act, 30 U.S.C. 932(c), that its own mines did not cause a claimant's "total disability due to pneumoconiosis" thereby shifts liability to the Black Lung Disability Trust Fund for payment of benefits to a claimant who prevails under Section 402(f)(2) and the HEW interim provision. This opportunity that Section 422(c) affords a coal operator to avoid *liability* for payment of black lung benefits is an even broader opportunity than the one the coal com-

panies incorrectly say would be unconstitutionally absent from the statutory scheme if Section 402(f)(2) were read to impose liability upon a coal company based on conclusive presumptions of "disability causation" and the presence of pneumoconiosis in ventilatory study cases. Section 422(c) is therefore a complete answer to the coal companies' due process challenge to Section 402(f)(2) as we read it. Moreover, independently of Section 422(c), *Usery v. Turner Elkhorn Mining Co.*, 425 U.S. 1 (1975) establishes that Section 402(f)(2), as applied to ventilatory study cases, is constitutional.

ARGUMENT

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) teaches that, pursuant to Section 402(f)(2) of the Act, the HEW interim provision at § 410.490 sets forth the *statutory* standard of restrictiveness for the "criteria" the Secretary may apply to claims, including Mr. Dayton's claim here, that are subject to the "not . . . more restrictive" mandate of Section 402(f)(2). *Sebben*, 488 U.S. at 113-16. In this context, the questions presented here are: (1) whether any rebuttal provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2) (*i.e.*, whether any such rebuttal provision is "more restrictive" than the "criteria" set forth in the HEW interim provision); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *See id.* at 119.

No. 89-1714, consolidated with this case, presents these same two questions. That case, however, is an "x-ray case," one in which the claimant successfully invoked the HEW interim presumption using x-ray evidence under § 410.490(b)(1)(i). No. 89-1714 App. at 39. This case, in contrast, is a "ventilatory study case," one in which the claimant successfully invoked the HEW interim presumption

using ventilatory study evidence under § 410.490(b)(1)(ii). The distinction is significant because the HEW interim provision does not operate in exactly the same way in ventilatory study cases as it does in x-ray cases. In that connection, the HEW interim provision defines somewhat different *statutory* standards of restrictiveness under Section 402(f)(2) in the two types of cases.

In No. 89-1714, Mrs. Pauley explains why, in an x-ray case such as hers, the "disability causation" rebuttal test at § 727.203(b)(3) is "more restrictive" than the "criteria" in the HEW interim provision and violates Section 402(f)(2). We fully agree with her analysis. However, the differences in the ways the HEW interim provision operates in x-ray and ventilatory study cases require a somewhat different analysis here.[5] We submit that in ventilatory study cases such as this one, the DOL interim regulation is "more restrictive" than the HEW interim provision with respect to *both* the "disability causation" rebuttal test at § 727.203(b)(3) and the presence of pneumoconiosis rebuttal test at § 727.203(b)(4). *See* § I.A *infra*. We also submit that both these rebuttal tests transgress Section 402(f)(2). *See* § I.B *infra*. We further submit that the Secretary of Labor's contrary interpretations of the HEW interim provision and Section 402(f)(2) are not entitled to deference. *See* § I.C *infra*. Finally, we submit that the resulting statutory eligibility scheme—one in which a claimant's eligibility is established without a complete factual inquiry into whether the claimant's total disability is due to pneumoconiosis arising out of coal mine employment—is consistent with the due process clause of the fifth amendment. *See* § II *infra*.

---

[5] The analyses in the two types of cases are not completely distinct but overlap in important ways. Indeed, as we explain *infra*, the ways in which the respective analyses overlap allow us to adopt major elements of Mrs. Pauley's argument. *See* Brief of Petitioner Harriet Pauley ("89-1714 Pet. Br.") at 19-49.

1. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL INTERIM REGULATION'S REBUTTAL TESTS AT §§ 727.203(b)(3) AND (b)(4) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION BY VENTILATORY STUDY EVIDENCE.

A. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Set Forth More Restrictive Criteria Than The Criteria In The HEW Interim Provision.

Both the HEW interim provision and the DOL interim regulation include rebuttal tests. §§ 410.490(c), 727.203(b). All rebuttal tests in the two provisions enumerate ways by which the presumptions of eligibility that the respective provisions provide, once invoked, may be defeated. *Sebben*, 488 U.S. at 109; *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 143-44, 154 (1987).

The first two rebuttal tests of the DOL interim regulation, §§ 727.203(b)(1) and (b)(2), are substantially the same as, and thus do not set forth more restrictive criteria than, the only two rebuttal tests of the HEW interim provision, §§ 410.490(c)(1) and (c)(2). However, the DOL interim regulation contains two additional rebuttal tests, §§ 727.203(b)(3) and (b)(4), neither of which has a discrete companion test in the HEW interim provision. Our position is that in ventilatory study cases both §§ 727.203(b)(3) and (b)(4) set forth "criteria" that are more restrictive than the criteria in the HEW interim provision because §§ 727.203(b)(3) and (b)(4) permit the opponents of the claims to defeat the claims in ways the HEW interim provision does not.

Both interim provisions provide that claimants who satisfy the requirements of their respective invocation subsections in ventilatory study cases will, *inter alia*, "be presumed to be totally disabled *due to pneumoconiosis arising out of coal mine employment.*" §§ 410.490(b), (b)(3), 727.203(a) (emphasis added). In ventilatory study cases

both interim provisions therefore confer the presumptions (a) that the miner's disability "aris[es] out of coal mine employment" (*i.e.*, "disability causation") and (b) that he has pneumoconiosis. Under the DOL interim regulation, the test at § 727.203(b)(3) allows the presumption of "disability causation" to be rebutted and the test at § 727.203(b)(4) allows the presumption of the presence of pneumoconiosis to be rebutted. In contrast, the HEW interim provision contains no provision, either in its invocation subsection, § 410.490(b), or in its rebuttal subsection, § 410.490(c), that directs any factual inquiry in ventilatory study cases concerning either "disability causation" or the presence of pneumoconiosis. "Disability causation" and the presence of pneumoconiosis are conclusively presumed under the HEW interim provision in ventilatory study cases.

In their briefs on the merits in the Fourth Circuit, neither the Director nor the coal companies that oppose Messrs. Dayton and Taylor in this case and in No. 90-113 contended that the HEW interim provision sets forth any factual inquiry that corresponds to the particular factual inquiry that either § 727.203(b)(3) or (b)(4) sets forth. Brief of the Federal Respondent ("Dir. 4th Cir. Br."), Brief of Respondent Consolidation Coal Co., *Dayton v. Consolidation Coal Co. and Director, O.W.C.P.*, 895 F.2d 173 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-114); Brief of the Appellee [Clinchfield Coal Co.], *Taylor v. Clinchfield Coal Co. and Director, O.W.C.P.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 90-113). They thereby implicitly conceded our position that the DOL interim regulation's rebuttal tests at §§ 727.203(b)(3) and (b)(4) *do* set forth criteria that are more restrictive than the criteria of the HEW interim provision.[6]

[6] Relying on other grounds, the Director and the coal companies nevertheless opposed awarding benefits to Messrs. Dayton and Taylor.

The Director and the coal companies, however, have backed away from this concession. Indeed, since filing their briefs on the merits to the Fourth Circuit, all have changed positions twice. Moreover, the Director's present position conflicts dramatically with the present position of the coal companies. These varying and inconsistent positions are the product of the Director's and the coal companies' frantic attempts to provide after-the-fact justifications to square §§ 727.203(b)(3) and (b)(4) with the "not . . . more restrictive" mandate of Section 402(f)(2) of the Act. But §§ 727.203(b)(3) and (b)(4) are unlawful implementations of Section 402(f)(2), so that none of the attempted justifications that the Director and coal companies posit is valid.

1. The HEW Interim Provision's Rebuttal Tests At §§ 410.490(c)(1) and (c)(2) Do Not Implicitly Incorporate Any Rebuttal Test Like That At § 727.203(b)(3) Or (b)(4).

In their petitions for rehearing in the Fourth Circuit in this case and in No. 90-113, the Director and Clinchfield Coal Company departed from their briefs on the merits to argue that §§ 727.203(b)(3) and (b)(4) do not set forth more restrictive criteria than the criteria of the HEW interim provision. This was so, they contended at the time, because the HEW interim provision's rebuttal tests at §§ 410.490(c)(1) and (c)(2) implicitly incorporate additional rebuttal tests like both §§ 727.203(b)(3) and (b)(4) of the DOL interim regulation. Respondent Director's Petition for Rehearing and Suggestion for Rehearing En Banc at 11-12, Clinchfield Coal Company's Petition for Rehearing at 8-9, *Clinchfield Coal Co.*, 895 F.2d 178; [Director, O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 7-8, *Dayton*, 895 F.2d 173.[7]

[7] Consolidation Coal Company did not file a petition for rehearing to the Fourth Circuit in this case but nevertheless changed its

(Footnote continued on following page)

As we point out at pp. 14-15 *infra*, the Director has now abandoned this rationale entirely, and the coal companies in this case and in No. 90-113 have now abandoned it as a justification for § 727.203(b)(4). The only Court ever to accept the rationale, the Third Circuit in No. 89-1714, applied the rationale to validate § 727.203(b)(3). That court observed that §§ 410.490(c)(1) and (c)(2) of the HEW interim provision parenthetically cite § 410.412(a)(1), which, the court said, "refers to a miner being 'totally disabled due to pneumonoconiosis.'" *Bethenergy Mines*, 890 F.2d at 1302. On this basis, it held that these parenthetical citations to § 410.412(a)(1) implicitly incorporate into the HEW interim provision an additional "disability causation" rebuttal test like the one at § 727.203(b)(3) of the DOL interim regulation. *Id.*

In her brief to this Court, Mrs. Pauley, the petitioner in No. 89-1714, demonstrates persuasively that the text of the HEW interim provision itself and the contemporaneous interpretation of HEW's interim provision that HEW set forth in a supplement to its Coal Miner's Benefits Manual, among other factors, contradict the Third Circuit's holding. 89-1714 Pet. Br. at 23-30. We adopt Mrs. Pauley's persuasive analysis. Like the Director, the coal companies should have abandoned the argument entirely because it is incorrect.

[7] *continued*

position as well by making this same argument in its petition for certiorari to this Court. Petition at 15-16. Both the Director and Bethenergy Mines, Inc. also made this argument in their briefs on the merits to the Third Circuit in No. 89-1714. Brief of the Federal Respondent at 18-22, Brief for the Petitioner Bethenergy Mines, Inc. at 18-20, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, 890 F.2d 1295 (3rd Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3325 (October 29, 1990) (No. 89-1714).

2. The Invocation Subparagraphs Of The HEW Interim Provision At §§ 410.490(b)(2) And (b)(3) Do Not Authorize Any Factual Inquiries Like The Ones That The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Authorize.

In their briefs to this Court, the Director and the coal companies in this case and in No. 90-113 have again changed their positions. The Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes factual inquiries like those that both of the DOL interim regulation's rebuttal tests at §§ 727.203(b)(3) and (b)(4) authorize, thereby validating these rebuttal tests. Brief of the Director, O.W.C.P. ("Dir. Br.") at 21-24. The coal companies now argue that § 727.203(b)(4) is valid because the *invocation* subparagraph of the HEW interim provision at either § 410.490(b)(2) or (b)(3)—the companies say they are unsure which of the two subparagraphs—authorizes a factual inquiry like the one that the § 727.203(b)(4) rebuttal test authorizes. Joint Brief for the Petitioners Clinchfield Coal Company and Consolidation Coal Company ("Coal Co. Br.") at nn. 32, 34. In contrast to the Director, however, the coal companies continue to argue that § 727.203(b)(3) is valid because the HEW interim provision's rebuttal tests at §§ 410.490(c)(1) and (c)(2) implicitly incorporate a rebuttal test like that at § 727.203(b)(3). *Id.* at 28-31.

So far as we are aware, neither the Secretary of Labor nor any coal company has ever before argued in any case in any forum that any of the *invocation* provisions of the HEW interim provision authorizes either a "disability causation" factual inquiry like that at § 727.203(b)(3) or, in ventilatory study cases, a presence of pneumoconiosis factual inquiry like that at § 727.203(b)(4). This new-found position, which does not bring with it any judicial or other authoritative support whatsoever, is wrong. Rather, both "disability causation" and the presence of pneumoconiosis

are conclusively presumed when a claimant proves the other significant facts that are necessary to invoke the HEW interim provision in ventilatory study cases.

a. The Text Of The HEW Interim Provision. As the portion of the text of § 410.490(b) that precedes § 410.490(b)(1) expressly provides, meeting the requirements of § 410.490(b) confers only a limited presumption—that the miner is "totally disabled due to pneumoconiosis." § 410.490(b). Significantly, this portion of the text of § 410.490(b) does *not* provide that meeting the requirements of § 410.490(b) confers any presumption that the miner's totally disabling pneumoconiosis "arose out of coal mine employment." Indeed, that the miner's affliction "arose out of coal mine employment" is itself one of the discrete requirements that a claimant must establish in order to obtain § 410.490(b)'s limited presumption that he is "totally disabled due to pneumoconiosis." § 410.490(b)(2).

The drafters structured § 410.490(b) this way to effectuate their decision to require one category of miners to prove, rather than benefit from a presumption, that their affliction arose out of coal mine employment. Specifically, those miners who satisfy § 410.490(b)(1) by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) but who worked in the mines *fewer than ten years* (*i.e.*, whose mining careers were too short to obtain the presumption of causation in § 410.416 or § 410.456, the sections of the HEW permanent regulations that § 410.490(b)(2) parenthetically references) must satisfy the § 410.490(b)(2) causation requirement by proving affirmatively that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2). Miners who successfully make this proof obtain the presumption that they are "totally disabled due to pneumoconiosis." § 410.490(b). Accordingly, they are presumed to be totally disabled due to the pneumoconiosis that, as they proved affirmatively, "arose out of coal mine employment." § 410.490(b)(2). The opponents of these claims then

have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c).

Neither of the other two categories of miners to whom the HEW interim provision is expressly available have to prove that their afflictions arose out of coal mine employment in order to satisfy § 410.490(b)(2). Rather, the § 410.490(b)(2) causation requirement is presumed with respect to both remaining categories of miners. First, miners who both satisfy § 410.490(b)(1) by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) and worked in the mines *ten years or more* automatically obtain the presumption of causation that § 410.416 or § 410.456 (the sections of HEW's permanent regulations that § 410.490(b)(2) parenthetically references) confers, thereby satisfying the § 410.490(b)(2) causation requirement. Miners who satisfy § 410.490(b)(2) by obtaining this presumption of causation also obtain the separate presumption that they are "totally disabled due to pneumoconiosis." § 410.490(b). Accordingly, they are presumed to be totally disabled due to the pneumoconiosis that, as is separately presumed, "arose out of coal mine employment." § 410.490(b)(2) (referencing §§ 410.416 and 410.456).

The opponents of these claims then have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c). Section 410.490(c), entitled "*Rebuttal of the presumption*," provides that "[t]he presumption in paragraph (b) of this section may be rebutted if" either of its two rebuttal tests is satisfied. § 410.490(c). The Director and the coal companies contend, however, that § 410.490(b)(2), an *invocation* requirement of the HEW interim provision, incorporates some sort of "pre-invocation" *rebuttal*. Coal Co. Br. at 26-27; Dir. Br. at 24. Specifically, they argue or suggest that with respect to miners who worked long enough in the mines to obtain the causation presumption that the permanent regulations at §§ 410.416 and 410.456 provide, § 410.490(b)(2) incorporates the rebuttal avenues that §§ 410.416 and 410.456 also provide. Coal Co. Br. at 26-27; Dir. Br. at 24. The Director argues that such pre-invocation rebuttal under § 410.490(b)(2) is the mechanism by which the HEW interim provision authorizes factual inquiries concerning "disability causation" and the presence of pneumoconiosis that the DOL interim regulation authorizes in its rebuttal tests at §§ 727.203(b)(3) and (b)(4), respectively. Dir. Br. at 24.[8] The coal companies argue that the posited pre-invocation rebuttal inquiry under § 410.490(b)(2), which, they say, would apply to ventilatory study cases as well as x-ray cases,[9] would entail only a factual inquiry concerning the presence of pneumoconiosis. Coal Co. Br. at 26-27.

The Director and the coal companies are wrong. First, as we discuss at pp. 19-21 *infra*, §§ 410.416 and 410.456 do not apply to ventilatory cases like Mr. Dayton's at all. Moreover, this Court has already rejected the contention of the Director and the coal companies that § 410.490(b)(2) incorporates some sort of pre-invocation rebuttal. Recognizing in *Sebben* that, as permanent regulations, "§§ 410.416 and 410.456 permit rebuttal of the[ir]

---

[8] By taking this position, the Director also contradicts yet another position that he took in the Fourth Circuit in this case. Observing both that § 727.203(b)(3) pertains to "disability causation" and that "§ 410.490(b)(2) . . . incorporates § 410.416 by reference," the Director contended below that "[t]he issues addressed by § 410.416 and § 727.203(b)(3) are entirely different and independent." [Director, O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 12, *Dayton*, 895 F.2d 173. The Director's position before the Fourth Circuit, which is the correct position, conflicts squarely with the position he has taken in his brief to this Court that § 410.490(b)(2) incorporates a "disability causation" factual inquiry like that at § 727.203(b)(3).

[9] The coal companies thereafter contradict themselves twice, first by acknowledging that they are unsure whether § 410.490(b)(2) applies to ventilatory study cases, Coal Co. Br. at n. 32, then by stating that "it seems" that § 410.490(b)(2) does *not* apply to ventilatory study cases. *Id.* at n. 34.

presumption[s]" of causation, the Court nevertheless held, with respect to the operation of the HEW interim provision, that "it is plainly not the intended purpose of paragraph (b)(2) [§ 410.490(b)(2)] to serve as a rebuttal provision. . . ." *Sebben*, 488 U.S. at 120.[10] Because § 410.490(c), by its express terms, is the rebuttal subsection of § 410.490, any conclusion that the invocation provision at § 410.490(b)(2) incorporates some sort of pre-invocation rebuttal would be counter-intuitive. If HEW had wanted to incorporate the rebuttal avenues of §§ 410.416 and 410.456 into its interim presumption, it would have included them in § 410.490(c).[11]

Section 410.490(b)(3) does not apply to either of the preceding categories of miners, both involving miners able to invoke the HEW interim provision using x-ray, biopsy, or autopsy evidence. Rather, by its express terms, § 410.490(b)(3) applies only to the remaining category of miners to whom the HEW interim provision is expressly

[10] That this was a holding of the Court in *Sebben* is apparent because it was essential to the Court's conclusion that requiring all miners in x-ray cases to prove at least ten years of coal mine employment would render § 410.490(b)(2) "entirely superfluous," *Sebben*, 488 U.S. at 120, a conclusion that was one of the factors on which the Court based its holding that § 410.490(b)(3) does not apply to x-ray cases. *Id.* at 119-20. Moreover, the Director has recognized that the Court "explicitly held" in *Sebben* that § 410.490(b)(2) does not allow any sort of pre-invocation rebuttal inquiry. [Director O.W.C.P.'s] Petition for Rehearing and Suggestion for Rehearing In Banc at 14, *Dayton*, 895 F.2d 173. Perhaps this is why the Director words the contrary contention he makes in his brief to this Court so obliquely. Dir. Br. at 24. In addition, the dissenting justices in *Sebben* concluded that miners who prove that they worked at least ten years in the mines "in so doing satisfy paragraph (b)(2) [§ 410.490(b)(2)]." *Id.* at 130 (Stevens, J., dissenting). The dissenting justices thereby demonstrated that they agreed with the majority that § 410.490 does not provide any sort of pre-invocation rebuttal.

[11] The circumstances attending the adoption of the HEW interim provision explain why the provision does not allow these additional rebuttal avenues. *See* § I.A.2.c *infra*.

available, miners able to invoke the provision using ventilatory study evidence. § 410.490(b)(3) (citing § 410.490(b)(1)(ii)); *Sebben*, 488 U.S. at 119-20.[12] As in those x-ray cases in which the miners worked at least ten years in the mines, miners in ventilatory study cases satisfy § 410.490(b)(2) by obtaining a presumption that their afflictions arose out of coal mine employment. However, unlike x-ray cases, in which §§ 410.416 and 410.456 are the provisions that automatically confer the causation presumption that satisfies § 410.490(b)(2), in ventilatory study cases § *410.490(b)(3)* is the provision that automatically confers the causation presumption that satisfies § 410.490(b)(2). Significantly, §§ 410.416 and 410.456, by their express terms, confer the causation presumption that satisfies the § 410.490(b)(2) requirement only for miners who both worked in the mines at least ten years *and* are "suffering or suffered from pneumoconiosis." §§ 410.416, 410.456.[13] While miners who meet the § 410.490(b)(1) requirement by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i) necessarily prove thereby that they actually have medical pneumoconiosis, the decisive fact is that miners who meet the § 410.490(b)(1) requirement instead by ventilatory study evidence under § 410.490(b)(1)(ii) do *not* thereby prove that they actually have pneumoconiosis. *See* pp. 26-27 and nn. 16, 21 *infra*. To be sure, the dissenting justices in *Sebben* believed that miners who meet both the ventilatory study requirement and the employment duration requirement of § 410.490 (b)(1)(ii) thereby "establish the presence of pneumoconiosis

[12] The dissenting justices in *Sebben* believed that § 410.490(b)(3) contains a "scrivener's error" that should be corrected so that the section applies to x-ray cases rather than to ventilatory study cases. The *Sebben* majority's rejection of the dissent's view is supported by the discussions at pp. 20-23 *infra* and in 89-1714 Pet. Br. at n. 11.

[13] Sections 410.416 and 410.456 are substantively indistinguishable except that § 410.416 applies to the claims of living miners and § 410.456 applies to the claims of the survivors of deceased miners. §§ 410.416, 410.456.

. . . *by inference*." *Sebben*, 488 U.S. at 128 (Stevens, J., dissenting) (emphasis added). But it is doubtful that establishing merely the inferential, and not the actual, presence of pneumoconiosis would be sufficient to obtain the presumption set forth in § 410.416 or § 410.456 that the miner's pneumoconiosis arose out of his coal mine employment.[14]

The drafters eliminated this problem by including in the HEW interim provision § 410.490(b)(3), which operates in the same way that §§ 410.416 and 410.456 (the sections that § 410.490(b)(2) parenthetically references) operate in the HEW interim provision, with two significant exceptions: (a) the drafters made § 410.490(b)(3), by its express terms, applicable only to ventilatory study cases, and (b) they omitted from § 410.490(b)(3) a requirement that the miner must have pneumoconiosis, the requirement they included in §§ 410.416 and 410.456. These distinct attributes enable § 410.490(b)(3) to serve the same function in

[14] If proving at least ten years of work in the mines and establishing the presence of "pneumoconiosis . . . by inference" would be sufficient to obtain the presumption set forth in § 410.416 or § 410.456, then miners who meet the requirements of § 410.490(b)(1)(ii) in ventilatory cases would automatically satisfy the HEW interim provision's invocation requirement at § 410.490(b)(2). § 410.490(b)(2) (referencing §§ 410.416 and 410.456). Otherwise, however, absent § 410.490(b)(3) miners who meet the requirements of § 410.490(b)(1)(ii) would, notwithstanding their lengthy tenures in the mines, be able to satisfy § 410.410(b)(2) only by proving affirmatively that the chronic respiratory or pulmonary impairments shown by their ventilatory studies arose out of coal mine employment. Having to make such proof, unlike having to prove that a miner's known medical pneumoconiosis arose out of coal mine employment, would have been extremely difficult, if not impossible. *E.g.*, *Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 82 (1973) (testimony of Lowell Martin, M.D., stating that "correlating [shortness of breath] with his [a miner's] job . . . is one heck of a problem when you want to get scientific"); *see also* 89-1714 Pet. Br. at 3-6, 8-10. As discussed in the text, the inclusion of § 410.490(b)(3) in the HEW interim presumption made providing such proof unnecessary.

ventilatory study cases that §§ 410.416 and 410.456 serve in x-ray cases. Sections 410.416 and 410.456, on the one hand, and 410.490(b)(3), on the other, satisfy the causation requirement of § 410.490(b)(2) for x-ray cases and ventilatory cases, respectively. Just as §§ 410.416 and 410.456 satisfy § 410.490(b)(2) in x-ray cases for miners who mined at least ten years by conferring the presumption that the pneumoconiosis shown by their x-ray, biopsy, or autopsy evidence arose out of coal mine employment, so too does § 410.490(b)(3) satisfy § 410.490(b)(2) in ventilatory study cases for miners who mined at least ten years (*i.e.*, all miners who meet the requirements of § 410.490(b)(1)(ii)) by conferring the presumption that the respiratory or pulmonary impairments shown by their ventilatory studies "ar[o]s[e] out of coal mine employment." § 410.490(b)(3). That conferring this causation presumption is one of § 410.490(b)(3)'s salient features is apparent because, as discussed at p. 15 *supra*, the portion of the text of § 410.490(b) that precedes § 410.490(b)(1) provides that meeting the requirements of § 410.490(b) does not otherwise confer the presumption that the miner's affliction arose out of coal mine employment but only the limited presumption that the "miner is totally disabled due to pneumoconiosis." § 410.490(b).

Another salient feature of § 410.490(b)(3) is that the mining duration requirement it specifies is ten years, a shorter tenure than the 15 years set forth in § 410.490(b)(1)(ii). *Compare* § 410.490(b)(1)(ii) *with* § 410.490(b)(3). This seeming discrepancy is what prompted the dissenting justices in *Sebben* to conclude that § 410.490(b)(3) contains a "scrivener's error." *Sebben*, 488 U.S. at 128-30 (Stevens, J., dissenting). But while the HEW interim provision may not be a model of clarity, the differing duration requirements in §§ 410.490(b)(1)(ii) and (b)(3) do not conflict with each other.

On October 17, 1972, less than three weeks after HEW's interim provision became effective as a regulation, 37 Fed.

Reg. 20634 (1972), HEW supplemented Part IV of its existing Coal Miner's Benefits Manual (the "Manual," a copy of which petitioner Pauley in No. 89-1714 has lodged with the Court). That supplement set forth in detail HEW's understanding of its interim provision. Manual at § IB6. The first paragraph of § IB6(d) of the Manual parallels and interprets § 410.490(b)(3) of the HEW interim provision. Besides reiterating § 410.490(b)(3)'s express terms, such as that it applies only to ventilatory study cases and is available only to miners who worked at least ten years in the mines, the first paragraph of § IB6(d) of the Manual varies from § 410.490(b)(3) by adding a parenthetical citation to § IB3(b) of the Manual. Section IB3(b) of the Manual parallels and interprets § 410.414(b), a provision of HEW's permanent regulations that sets forth a presumption available to miners who worked in the mines, depending on varying circumstances, either a minimum of 15 years, § 410.414(b)(3), or "many years . . . (although less than 15)." § 410.414(b)(4).

The presumption at § 410.414(b) of HEW's permanent regulations is far more restrictive to claimants than HEW's interim presumption at § 410.490, but the parenthetical reference in the first paragraph of § IB6(d) of the Manual to § IB3(b) demonstrates that the drafters derived the HEW interim provision's ventilatory study presumption at least in part from the § 410.414(b) permanent presumption. Indeed, § IB3(b)(4) of the Manual, in interpreting § 410.414(b)'s mining duration requirement of "many years . . . (although less than 15)," even addresses the HEW interim provision specifically, stating that "[f]or purposes of the interim criteria in B.6 of this part [§ IB6 of the Manual], the presumption will normally be made where the miner had *at least 10 years of coal mine work*." Manual § IB3(b)(4) (emphasis added). Thus, besides explaining that the 15-year mining duration requirement in § 410.490(b)(1)(ii) is derived from the permanent regulation at § 410.414(b) and that the ten-year mining duration requirement of § 410.490(b)(3) is, in turn, derived from that 15-year presumption, the parenthetical reference to § IB3(b) establishes that the ten-year mining duration is the one that has operative effect.

Consistently, the 15-year mining duration requirement of § 410.490(b)(1)(ii) is not set forth in § IB6(c)(1)(B), the provision of the Manual that otherwise parallels § 410.490(b)(1)(ii), or in any other provision of the Manual pertaining to the interim provision. Significantly, that the Manual completely ignores the 15-year mining duration requirement of § 410.490(b)(1)(ii) is also consistent with, and is therefore a permissible interpretation of, the text of the HEW interim provision. The HEW interim provision expressly provides, in relevant part, that a "miner will be [entitled to the presumption that the provision confers] if[,] . . . [i]n the case of a miner employed for at least 15 years in [the mines, his] ventilatory studies [meet specified values]." §§ 410.490(b),(b)(1)(ii). Because the provision does not state that in ventilatory study cases the presumption will be conferred *only* on miners who worked in the mines at least 15 years, it is compatible with an interpretation that would confer its presumption in ventilatory study cases on miners who worked fewer than 15 years in the mines.[15]

Thus, to invoke the HEW interim presumption by ventilatory study evidence, claimants need only prove affirmatively both that their ventilatory studies meet the requisite table values, § 410.490(b)(1)(ii), and that they worked at least ten years in the mines. §§ 410.490(b)(3). In this

[15] The coal companies, in contending incorrectly that "[t]he ten year requirement in paragraph (b)(3) [§ 410.490(b)(3)] in light of the fifteen year requirement in paragraph (b)(1)(ii) [§ 410.490(b)(1)(ii)] is inexplicable," Coal Co. Br. at 29 n. 34, exhibit their lack of understanding of the HEW interim provision.

case, the ALJ concluded both that Mr. Dayton worked in the mines for 17 years, Pet. App. at 15, and that his ventilatory studies meet the table values at § 727.203(a)(2), *id.* at 19-20, which are identical to the table values in the HEW interim provision at § 410.490(b)(1)(ii). *Compare* § 410.490(b)(1)(ii) *with* § 727.203(a)(2). Mr. Dayton therefore invoked the HEW interim provision, and the Director is wrong in contending otherwise. Dir. Br. at 21.

Once the HEW interim presumption is invoked by ventilatory study evidence, the opponents of these claims then have the opportunity to defeat the claims under the HEW interim provision's rebuttal subsection, § 410.490(c). As discussed at pp. 16-18 *supra*, the Director and the coal companies have contended incorrectly that § 410.490(b)(2) incorporates some sort of "pre-invocation" rebuttal. The Director apparently contends that § 410.490(b)(3), too, incorporates some type of pre-invocation rebuttal. Dir. Br. at n. 16. Section 410.490(b)(3), however, contains nothing in its text and no citations that could even arguably provide such pre-invocation rebuttal. § 410.490(b)(3). Nevertheless, the Director, after quoting much of the first paragraph of § IB6(d) of HEW's Coal Miner's Benefits Manual (the Manual provision that parallels § 410.490(b)(3)), concludes that "the manual contemplated (somewhat paradoxically) that 'rebut[tal]' would be allowed in some circumstances *before* the presumption was invoked." Dir. Br. at n. 16 (emphasis in text). However, the Director's strained reading of the Manual is incorrect. Section IB6(d) of the Manual does not state that the rebuttal to which it refers should occur before invocation or vary in any other way from the rebuttal that § 410.490(c) itself provides. Indeed, if the rebuttal that IB6(d) of the Manual set forth did vary from, and were inconsistent with, the rebuttal that the HEW interim provision itself provides, the HEW interim provision's rebuttal would govern and the Manual's rebuttal would not be entitled to deference. *See Mullins*, 484 U.S. at 159.[16]

b. HEW's Contemporaneous Interpretation Of Its Interim Provision And The Case Law. That the HEW interim provision operates as described in § I.A.2.a *supra* is not only apparent from the case law, *e.g.*, *Sharpless v. Califano*, 585 F.2d 664, 666 (4th Cir. 1978), but is confirmed by HEW's Coal Miner's Benefits Manual, which includes HEW's contemporaneous and detailed interpretation of its interim provision. Indeed, the very structure of the Manual's sections pertaining to the HEW interim provision supports our construction. Section IB6(c) of the Manual contains only two subparagraphs, one parallelling § 410.490(b)(1) of the HEW interim provision, Manual § IB6(c)(1), and the other parallelling § 410.490(b)(2). Manual § IB6(c)(2). But the Manual does not include in § IB6(c) a third subparagraph parallelling § 410.490(b)(3). Rather, the Manual sets forth its provision paralleling § 410.490(b)(3)

[16] A different Manual section, § IB6(e)(3), is, however, plainly erroneous because it is inconsistent with § 410.490 itself. Section IB6(e)(3), which provides that the HEW interim presumption will be rebutted "if [b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists," Manual § IB6(e)(3), is a rebuttal test that HEW did not enumerate in the text of the HEW interim presumption but nevertheless included in the Manual. Section IB6(e)(3) has no operative effect in these consolidated cases because no party submitted biopsy or autopsy evidence in any of them. Nevertheless, that Section IB6(e)(3) appears in the Manual is significant. First, that it appears only in the Manual confirms that under the HEW interim provision itself the presence of medical pneumoconiosis is conclusively presumed in ventilatory study cases. This is significant because in 1972, when HEW promulgated its interim provision, a miner could not satisfy the legal definition of pneumoconiosis without having medical pneumoconiosis. 30 U.S.C. § 902(b) (1970 & Supp. II 1972). The legal definition had not yet been broadened to include respiratory and pulmonary impairments other than medical pneumoconiosis. *See* p. 27 *infra*. Second, that the Manual added only the medical pneumoconiosis rebuttal test at § IB6(e)(3) emphasizes the absence from the HEW interim provision of a rebuttal test or factual inquiry concerning either "disability causation" or the presence of legal pneumoconiosis.

as the first of two unenumerated paragraphs in an entirely separate *section*, § IB6(d). By structuring its Manual provisions this way, HEW clarified that § 410.490(b)(3) is not a third co-equal invocation requirement but, consistent with the express terms of the HEW interim provision, is a means of satisfying the causation requirement at § 410.490(b)(2) in ventilatory study cases. That the other paragraph of § IB6(d), which pertains to x-ray cases, also describes a means of satisfying the causation requirement of § 410.490(b)(2) further confirms this conclusion. Manual § IB6(d). Because Sections IB6(c) and IB6(d) of the Manual are not "plainly erroneous or inconsistent with the regulation," they "deserve[ ] substantial deference." *Mullins Coal Co v. Director, O.W.C.P.*, 484 U.S. 135, 159 (1987) (citation omitted).

c. The Circumstances Attending Adoption Of The HEW Interim Provision. A successful claimant must satisfy four elements: (a) that he has pneumoconiosis, (2) that his pneumoconiosis arose out of coal mine employment (*i.e.*, "disease causation"), (3) that he is unable to perform his usual coal mine work or comparable work (*i.e.*, "disability severity"), and (4) that he meets the "disability severity" standard because of his coal mine employment (*i.e.*, "disability causation"). *See Sebben*, 488 U.S. at 114 (enumerating three elements of a claim, one of which, denominated "total disability," included both the "disability severity" and "disability causation" elements). A claimant who successfully invokes the HEW interim provision using either x-ray or ventilatory study evidence must withstand the two rebuttal inquiries—whether he is doing, or is able to do his usual coal mine employment, §§ 410.490(c)(1) and (c)(2)—both of which address the "disability severity" element of a claim.

In x-ray cases, a claimant's x-ray, biopsy, or autopsy evidence also proves the presence of pneumoconiosis element, § 410.490(b)(1)(i), and, unless he worked in the mines

at least the ten years necessary to obtain the presumption at § 410.416 or § 410.456, he must prove the "disease causation" element at § 410.490(b)(2). However, as petitioner Pauley explains in 89-1714 Pet. Br. at Argument § I.A, a miner in an x-ray case need not prove the "disability causation" element, which is conclusively presumed.

The HEW interim provision operates differently in ventilatory study cases than it does in x-ray cases because the two forms of evidence show different things. Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." Stedman's Medical Dictionary 1108 (24th ed. 1982). The Act, as it read when the HEW interim provision was promulgated in 1972, set forth an abbreviated version of the medical definition of "pneumoconiosis" but narrowed the medical definition by including only medical pneumoconiosis "arising out of coal mine employment." 30 U.S.C. § 902(b) (1970 & Supp II 1972).[17] While x-ray, biopsy, and autopsy evidence are the forms of evidence that show the presence of medical pneumoconiosis, §§ 410.490(b)(1)(i), ventilatory studies show only a "chronic respiratory or pulmonary disease," § 410.490(b)(1)(ii), which may or may not be medical pneumoconiosis. Indeed, unable to prove by x-ray, biopsy, or autopsy evidence that he had medical pneumoconiosis, a claimant in a ventilatory study case could not possibly prove affirmatively that he had "pneumoconiosis" within the meaning of the Act as it read in 1972.

The only other way HEW could have allowed an inquiry addressing whether the miner had pneumoconiosis would

[17] As amended in 1978, Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(a), 92 Stat. 95 (1978), the Act broadened the statutory definition of "pneumoconiosis" to include all respiratory and pulmonary impairments, whether medical pneumoconiosis or not, that arise out of coal mine employment. 30 U.S.C. § 902(b).

have been to allow the claimant's opponent to prove that the respiratory or pulmonary disease shown by the claimant's ventilatory studies could not possibly meet the statutory definition of "pneumoconiosis" because such disease, whatever it is, does not arise out of coal mine employment. Significantly, however, any such inquiry would necessarily have addressed not only the presence of pneumoconiosis element of a claim but also the "disease causation" and "disability causation" elements as well. Specifically, such an inquiry would necessarily have addressed the "disease causation" element because it would have allowed the claimant's opponent to prove that the disease shown by claimant's abnormal ventilatory studies, whether that disease was medical pneumoconiosis or not, did not arise out of coal mine employment. Similarly, such an inquiry would necessarily have addressed the "disability causation" element as well because it would have allowed the claimant's opponent to prove that the functional impairment shown by the abnormal ventilatory studies did not arise out of coal mine employment.[18]

For the reasons discussed in petitioner Pauley's brief (89-1714 Pet. Br. at 28-30), HEW chose to draft its interim provision to presume the "disability causation" element conclusively. As we have explained, however, HEW could not have drafted its interim provision to presume the "disability causation" element conclusively in ventilatory study cases without conclusively presuming the presence of pneumoconiosis and "disease causation" elements in such cases as well. Moreover, by requiring claimants in ventilatory study cases to prove affirmatively both that they have a respiratory or pulmonary impairment

[18] Besides showing the presence of disease(s), abnormal ventilatory studies show functional impairment, 45 Fed. Reg. 13683 (1980), which could meet the standard of the "disability severity" element of a claim either alone or in conjunction with one or more non-respiratory impairments.

of a specified degree, § 410.490(b)(1)(ii), and that they worked in the mines at least ten years, § 410.490(b)(3), and then to withstand rebuttal addressing whether they meet the requisite "disability severity" standard, §§ 410.490(c)(1), (c)(2), the HEW interim provision subjects claimants in ventilatory studies to as many relevant factual inquiries as possible without subjecting them to a "disability causation" factual inquiry.

B. In Cases In Which The Claimant Meets The Invocation Requirements Of The HEW Interim Provision By Ventilatory Study Evidence, The DOL Interim Regulation's Rebuttal Tests At §§ 727.203(b)(3) And (b)(4) Violate Section 402(f)(2) Of The Act.

1. If this Court accepts our position that the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria the HEW interim provision sets forth, *see* § I.A. *supra*, then affirmance of the judgment below is required because the "disability causation" and presence of pneumoconiosis criteria in §§ 727.203(b)(3) and (b)(4) are the types of "criteria" that Section 402(f)(2) says cannot be more restrictive in the DOL interim regulation than they are in the HEW interim provision. *See Sebben*, 488 U.S. at 114.

First, as petitioner Pauley explains (89-1714 Pet. Br. at 30-31), this Court's decision in *Sebben* strongly supports reading the term "criteria" in Section 402(f)(2) to mean all criteria "applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). Such criteria encompass *all* criteria in the HEW interim provision, *see Sebben*, 488 U.S. at 113-116, including its criteria for "disability causation" and the presence of pneumoconiosis, both of which, in ventilatory study cases, are conclusively presumed.

Congress placed Section 402(f)(2) in Section 402(f), which defines "total disability;" and this placement, the Secre-

tary of Labor argued in *Sebben*, suggests that the term "criteria" in Section 402(f)(2) may be limited to "total disability" criteria. *See Sebben*, 488 U.S. at 114 (characterizing that reading as having "merit, though . . . by no means [being] free from doubt"). But that reading of the term similarly obliges the conclusion that the presence of pneumoconiosis and "disability causation" criteria at issue here *are* Section 402(f)(2) "criteria." This is because the statute itself defines "total disability" specifically to include these criteria. Section 402(f)(1)(A) thus states that regulations defining "total disability" shall "provide that a miner shall be considered totally disabled" when [1] "pneumoconiosis," defined in Section 402(b), 30 U.S.C. § 902(b), to include a certain respiratory disease [2] arising out of coal mine employment, [3] "prevents him or her from [4] engaging in gainful employment requiring skills and abilities [of certain types.]" Parsing the statute in this way, the statutory definition of "total disability" includes: element 1, *the presence of the disease pneumoconiosis*; element 2, "disease causation;" element 3, "*disability causation*;" and element 4, "disability severity."[19]

Moreover, in *Sebben* this Court held that a particular requirement of the DOL interim regulation that "bears

[19] Remarkably, the coal companies in this case and in No. 90-113 urge that the "'criteria' referred to in [30 U.S.C.] Section 902(f)(2) must be criteria for determining whether a miner is totally disabled or died due to pneumoconiosis," Coal Co. Br. at 34, but then ignore the statutory definition of "total disability," which plainly includes both the presence of pneumoconiosis and "disability causation" criteria, in urging that the latter criteria are *not* Section 402(f)(2) "criteria." In *Sebben*, the Director argued that the term "criteria" in Section 402(f)(2) should be limited to "total disability" criteria relating to the "severity" of a claimant's impairments. *See Sebben*, 488 U.S. at 114. However, he has abandoned any such suggestion here perhaps because, as we explain in the text, such a limitation is without support in Section 402(f)(1)(A). *See id.* (specifically defining "total disability" as the "inability of the claimant to do his former coal mine work or the equivalent *because of pneumoconiosis*") (emphasis added).

proximately upon" one criterion violates Section 402(f)(2) if it "bears *ultimately* upon" some other criterion that the word "criteria" in Section 402(f)(2) concededly encompasses (*e.g.*, the "disability severity" criterion). *Sebben*, 488 U.S. at 114 (emphasis in original). Here, as the Director expressly acknowledges (Dir. Br. at 26 n. 21), both the presence of pneumoconiosis and the disability causation "rebuttal provisions at issue" *do* bear ultimately upon whether the "severity" of a claimant's disability is "presumed." *Id.* (citing *Sebben*, 488 U.S. at 114); *see also* 89-1714 Pet. Br. at 33 n. 23 (explaining more fully the significance of such an acknowledgement).

2. The Director quotes that part of Section 402(f)(2) that refers to "criteria *applicable* to a claim filed on June 30, 1973," Dir. Br. at 25 (emphasis added), and says that the question before the Court is "what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied." *Id.* He then suggests, by using a hypothetical "involving corruption," that if the HEW interim provision were read to incorporate a conclusive presumption of the presence of pneumoconiosis or "disability causation," it might be unlawful. Dir. Br. at 25 n. 20. He also points out that the ventilatory study table values that the Secretary of Labor included in the DOL interim regulation were the same, and therefore no more restrictive than, those in the HEW interim provision. *Id.* at 26. He notes further that other presumptions applicable to Part B claims—those in Sections 411(c)(1) and (c)(4) in particular—do not carry with them conclusive presumptions of either the presence of pneumoconiosis or "disability causation." *Id.* at 26-28. He observes as well that in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court construed Section 422 of the Act to impose liability upon a coal operator only "for pneumoconiosis arising out of employment in a coal mine." Dir. Br. at 28 (citing *Turner Elkhorn Mining*, 428 U.S. at 22 n. 21).

Finally, he cites in passing (Dir. Br. at 28 n. 22) Section 413(b), 30 U.S.C. § 923(b), requiring DOL to consider "all relevant evidence." He says that the cumulative import of these factors makes it "[un]reasonable" to conclude that the Congress that enacted Section 402(f)(2) believed that benefits could be awarded to claimants under Part B (and under the HEW interim provision in particular) absent factual inquiries concerning "disability causation" and the presence of pneumoconiosis. *Id.* at 25-28.

We agree that, for purposes of Section 402(f)(2) analysis, the central question is what "criteria" were "applicable" under Part B (and under the HEW interim provision in particular), not what criteria HEW actually applied. The criteria HEW actually applied, however, constitute substantial evidence of the criteria HEW thought were "applicable." *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 211 (1988) (declining to defer to agency's current interpretation of Medicare Act provision when that interpretation was inconsistent with agency's "past implementation of that provision.") In this context, the Director's inability to cite a single case in which HEW denied benefits under its interim provision in a ventilatory study case based on a factual inquiry into the presence of medical pneumoconiosis or "disability causation" weighs heavily, if not conclusively, in Mr. Dayton's favor.

The Director contends that the Congress that enacted Section 402(f)(2) was entitled to presume that the HEW interim provision it was incorporating into the statute was lawful and that this Court should not lightly assume that Section 402(f)(2) gave statutory force to regulatory provisions that violated the statute. Dir. Br. at 25-28. The central problem for the Director in this regard is that the HEW interim provision's conclusive presumptions of the presence of pneumoconiosis and "disability causation" in ventilatory study cases did not make that provision unlawful. As petitioner Pauley has explained (89-1714 Pet.

Br. at 40-41 n. 25), the Act in 1972 gave the Secretary of HEW legislative authority to write regulations defining the eligibility standards for Part B claims. This means that any regulations HEW issued in 1972 that "prescribe[d] standards" defining "total disability" were lawful unless they were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *see also Batterton v. Francis*, 432 U.S. 416, 425 (1977). The Director, however, makes no directed argument whatsoever that conclusive presumptions of the presence of pneumoconiosis and "disability causation" ran afoul of this expansive standard, limiting himself to one hypothetical (and bizarre) example of a criterion that clearly would have been unlawful if applied to Part B claims.[20] That example falls far short of the requisite showing.[21]

---

[20] The example the Director employs hypothesizes that HEW awarded benefits under its interim provision to "any claimant who bribed a claims adjudicator." Dir. Br. at 25 n. 20.

[21] Such a showing cannot be made at all. As petitioner Pauley explains in some detail (89-1714 Pet. Br. at 3-6, 28-30), the conclusive presumption of "disability causation" in the HEW interim provision is properly understood as the product of a reasonable agency cost/benefit analysis.

This same analysis, as applied to ventilatory study cases, explains why the HEW interim provision conclusively presumes the presence of pneumoconiosis in ventilatory study cases. *See* pp. 26-29 *supra*. It is also noteworthy that the same Congress that had directed the Secretary of HEW to develop interim criteria that would expedite the processing of claims, S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972), had been "presented with significant evidence demonstrating that x-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease." *Turner Elkhorn Mining*, 428 U.S. at 31-32; *see also Mullins*, 484 U.S. at 151-52. The Surgeon General had also testified before Congress that the "15-year point marks the beginning of a linear increase in the prevalence of the disease [pneumoconiosis] with years spent underground. . . ." *Turner Elkhorn Mining*, 428 U.S. at 31. Finally, Congress had concluded that the "limited medical resources" in

(Footnote continued on following page)

Nor does the fact that the DOL interim regulation incorporates the ventilatory study table values of the HEW interim provision help the Director. As the Director himself emphasizes (Dir. Br. at 25), the Congress that passed Section 402(f)(2) was concerned that the Secretary of Labor not impose on Part C claims *any* "more . . . restrictive" criteria than were "applicable" to Part B claims. Accordingly, that the ventilatory study table values in the DOL interim regulation are not more restrictive than those in the HEW interim provision is irrelevant, the question here being, as the Director acknowledges (Dir. Br. at 26 n. 21), whether the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) are more restrictive than the criteria in the HEW interim provision.

[21] *continued*
coal mining areas and the "state of the [medical] art" each made it difficult for miners to prove that they suffered from pneumoconiosis or that it contributed to their disability. S. Rep. No. 743, 92d Cong., 2d Sess. 9, 18 (1972). In this context, the HEW interim provision, as it operates in ventilatory study cases, is properly understood to afford a conclusive presumption of medical pneumoconiosis when: (a) the miner has worked in the mines a sufficient number of years that the respiratory impairment from which he suffers (as measured by the table values in § 410.490(b)(1)(ii)) is likely to be medical pneumoconiosis; (b) the medical evidence that an operator would most likely proffer to show that the miner did not have medical pneumoconiosis—x-ray evidence—was evidence Congress regarded as "untrustworthy" evidence of the absence of that disease; and (c) it was, in any event, very difficult for miners to secure medical evidence that might counter any rebuttal evidence of the absence of pneumoconiosis that the operator would be permitted to put forward. We note also that, in apparent reliance on the Senate Committee's direction that eligibility should be considered for miners with severe respiratory impairments and "many years of coal mine work, though short of fifteen," S. Rep. No. 743, 92d Cong., 2d Sess., 11-12 (1972), HEW permitted invocation of its interim presumption by a showing of qualifying ventilatory study evidence and *ten* years of coal mine work, the Surgeon General's testimony concerning 15 years notwithstanding. *See* Manual § IB6(d) (cross-referencing Manual § IB3(b), including Manual § IB3(b)(4)); § 410.414(b)(4).

The Director's reliance on the presumptions at Sections 411(c)(1) and (c)(4) of the Act is merely a modest rhetorical reformulation of the point he pressed before the court of appeals: that the HEW interim provision should not be construed to "fundamentally change the statutory scheme," which he characterized as generally *not* affording conclusive presumptions of either the presence of pneumoconiosis or "disability causation." Dir. 4th Cir. Br. at 19. And petitioner Pauley has persuasively refuted this contention as well. 89-1714 Pet. Br. at 37-38.

Petitioner Pauley also answers the Director's reliance on Section 422 of the Act, which this Court in *Turner Elkhorn Mining* discussed. 428 U.S. at 222 n. 21. As Mrs. Pauley explains (89-1714 Pet. Br. at 46), Section 422(c) is a provision that, by its terms, relates solely to the *liability* of coal operators for benefits payable to eligible miners, permitting an operator to avoid liability for the payment of benefits to a miner already found eligible for them if it shows that the miner's disability or death due to pneumoconiosis "did not arise, at least in part" out of employment in one of the operator's own mines.[22] Contrary to the Director's suggestion (Dir. Br. at 26, 28), our reading of Section 402(f)(2)—that it establishes conclusive presumptions of the presence of pneumoconiosis and "disability causation" in ventilatory study cases for *eligibility*

[22] In a ventilatory study case, this standard permits the operator to avoid liability by proving either that the miner did not have pneumoconiosis or that his disability was not "due to pneumoconiosis," since if the miner did not in fact have pneumoconiosis at all, then obviously his death or disability did not arise out of employment in the operator's mines.

Mrs. Pauley explains more fully (89-1714 Pet. Br. at 46) that an operator who meets his burden of proof under Section 422(c) only shifts liability for payment of benefits to the Black Lung Disability Trust Fund, 26 U.S.C. § 9501(d)(1)(B); 30 U.S.C. § 932(j), but does not defeat the claim of a miner who establishes his eligibility under other provisions of the Act and regulations—here Section 402(f)(2) and the HEW interim provision.

purposes—is not inconsistent with Section 422(c), which authorizes factual inquiries into both the presence of pneumoconiosis and "disability causation" for *liability* purposes.

Nor does Section 413(b), providing for the consideration of "all relevant evidence" in the adjudication of claims, offer the Director any support.[23] As the Seventh Circuit held in denying the Director's petition for rehearing in *Taylor v. Peabody Coal*, 892 F. 2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696), the Section 413(b) directive to consider "all *relevant* evidence" cannot be read to "alter any substantive rule of law," such as that contained in Section 402(f)(2) and the HEW interim provision. Order denying rehearing in *Peabody Coal Co.* at 89-1696 App. 2a (emphasis added). The analytically decisive distinction is between, on the one hand, determinations of whether a "piece of evidence [is] 'relevant' " and "admissib[le]" and, on the other, the "substantive law" that governs the merits of the question being determined in the evidentiary proceeding. *Id.* The governing substantive law here is the "criteria" in Section 402(f)(2) that set forth the statutory standard of restrictiveness for the DOL interim regulation. A "standard of admissability" such as that contained in Section 413(b) "cannot control [this] substantive law." *Id.*; *see also* 89-1714 Pet. Br. at 35-37 (also discussing Section 413(b)). Because whether a miner has pneumoconiosis is irrelevant

[23] In the court below, the Director also relied on Section 413(b) and on a statement in the conference report accompanying the 1978 amendments that regulations promulgated pursuant to Section 402(f)(2) "shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria, all relevant medical evidence shall be considered. . . ." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978). *See* Dir. 4th Cir. Br. at 17-18. In this Court, however, he does not refer to the conference committee statement, which, for the reasons petitioner Pauley explains (89-1714 Pet. Br. at 35-37), offers no support for his position in any event.

under the HEW interim rebuttal tests, Section 413(b) does not require the Secretary to consider evidence concerning the presence of absence of pneumoconiosis in determining whether opponents have rebutted particular claims.

3. As we have explained in § I.A *supra*, the interpretation of the HEW interim provision that the coal companies in this case and in No. 90-113 proffer diverges sharply from that of the Director. In contrast, the coal companies' interpretation of Section 402(f)(2) tracks the corresponding interpretation of the Director quite closely. *Compare* Coal Co. Br. at 33-40 *with* Dir. Br. at 25-28. Accordingly, in answering the Director's arguments concerning Section 402(f)(2), we have already addressed most of the points the coal companies raise. Moreover, petitioner Pauley anticipated and answered (89-1714 Pet. Br. at 35-38) the coal companies' continued reliance (Coal Co. Br. at 40) on the "all relevant medical evidence" proviso in the conference report accompanying the 1978 amendments. We adopt that response here.

The coal companies also rely (Coal Co. Br. at 34) on Section 401(a) which, they emphasize, says that the "purpose" of the Benefits Act is to provide "benefits . . . to coal miners who are totally disabled *due to pneumoconiosis*. . . ." (emphasis added). And they pair that provision (Coal Co. Br. at 34-35) with Section 402(f)(1)(A), discussed at p. 30 *supra*. Reading Sections 401(a) and 402(f)(1)(A) together, the coal companies conclude that our reading of Section 402(f)(2), under which the presence of pneumoconiosis and "disability causation" are conclusively established upon proof of other significant facts, does not "fit very well" into the " 'provisions' " and " 'policy' " of the Act, and therefore should be rejected. Coal Co. Br. at 34 (quoting *Dole v. United Steelworkers of America*, 110 S. Ct. 929, 934 (1990)).

This analysis is erroneous in numerous respects, all of which petitioner Pauley exposes. *See* 89-1714 Pet. Br. at 38-44.[24] However, the principal deficiency besetting the coal companies' reliance on both Section 401(a) and Section 402(f)(1)(A) is the same: as Mrs. Pauley explains more fully (89-1714 Pet. Br. at 10-12, 43-44), such reliance ignores the fact that Section 402(f)(2) was compromise legislation that resolved a legislative struggle between coal miners and the industry. *See Sebben*, 488 U.S. at 140 (Stevens, J., dissenting).

C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference.

The Director and the coal companies in this case and in No. 90-113 both plea for deference to the Secretary of Labor's current interpretation of "the Black Lung Benefits Act." Dir. Br. at 32-33; Coal Co. Br. at 40-41. However, because Section 402(f)(2) of the Act interrelates with the HEW interim provision—the former provision adopting the latter as the *statutory* standard of restrictiveness—the joint plea is one that asks for deference to the Secretary's reading of both provisions.

The joint plea for deference is unavailing.

1. An agency's interpretations of its own regulations are generally entitled to considerable deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, so far as deference to the Secretary of Labor's reading of the HEW interim provision as a regulation is concerned, this general rule is inapplicable, as that provision was not her regulation but was the Secretary of HEW's. *See Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). If deference is owing to an agency understanding of

[24] Mrs. Pauley's discussion also answers the Director's companion reliance (Dir. Br. at 19) on Section 401(a).

§ 410.490 in ventilatory study cases, the relevant understanding is that of HEW. As we have explained in § I.A.2.b *supra*, HEW's interpretation of its interim provision, which HEW set forth in its Coal Miner's Benefits Manual, supports our view that both the presence of pneumoconiosis and "disability causation" are conclusively presumed in ventilatory study cases.

2. Deference to an administrative agency's construction of a statute is inappropriate if a court, "[e]mploying traditional tools of statutory construction," is able to discern Congress' intent in enacting the measure. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, 446 (1987). *Accord NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). Here, those tools, principally the statutory text itself, do permit this Court to decide what the statute, and Section 402(f)(2) in particular, means. *See* § I.B. *supra*. Indeed, the Court decided the closely analogous question presented in *Sebben* against the Secretary of Labor without deferring to the understanding of Section 402(f)(2) that the Secretary profferred there. *Sebben*, 488 U.S. at 113-118. For the same reasons, the Secretary's view of Section 402(f)(2) is not entitled to any deference here either.

3. These important considerations aside, the normal rules governing deference to an agency's views of its own regulations and of the statute it administers simply do not apply here. The Senate committee report accompanying the 1978 amendments to the Act expressed the expectation that, in interpreting the amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). DOL, by regulation, has bound itself to comply with this congressional directive. § 718.3(c). Accordingly, the applicable deference principles are very nearly the opposite of what they would be in the usual case, where, if deference is owing at all, the agency view will usually be up-

held if it is "reasonable," or sometimes merely "permissible." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 843-44 (1984). Here the agency itself is obliged to defer to the *claimants'* interpretation of the statute if *it* is reasonable or permissible and favorable to coal miners. We submit that our interpretation of the HEW interim provision and Section 402(f)(2), which is clearly more favorable to coal miners than the Secretary of Labor's, is both reasonable and permissible. *See* §§ I.A. and I.B. *supra*. Accordingly, the Secretary of Labor should have adopted it, and the contrary interpretations she did adopt are not entitled to deference.

4. An agency construction of a statute or regulation that is neither "consistent" nor "contemporaneous" with the enactment or promulgation of the statute or regulation being construed is not worthy of deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). (declining to give any deference to agency's "current interpretation" of statute advanced in this Court, when it was "contrary to the . . . view of . . . [the statute] advanced in past cases. . . .").

a. The Secretary of Labor's current interpretation of the HEW interim provision, far from being contemporaneous with the promulgation of that regulation in 1972, dates only from the Director's submission of his brief to this Court in this case in December 1990. So far as we are aware, that submission marked the first time, in any forum adjudicating the several hundred thousand § 410.490 cases that have been decided, that the Secretary ever maintained that § 410.490(b)(2) authorizes defeat of a claim under the HEW interim provision by factual showings that the claimant did not have pneumoconiosis or that his disability was not "due to pneumoconiosis." Indeed, prior to the submission of the Director's brief here, the Secretary did not even consistently maintain in the many Section 402(f)(2) cases that *anything* in § 410.490 incorporated such directives. For example, the Director's brief on the

merits in the Fourth Circuit in this very case contains not a hint of any reading of the HEW interim provision under which it provided factual inquiries into the presence of pneumoconiosis or "disability causation" at either the invocation or rebuttal stage. Dir. 4th Cir. Br. Moreover, when the Secretary changed positions to advance such a reading, as she did in the Director's petition for rehearing below, she based it on her reading of the parenthetical references in §§ 410.490(c)(1) and (c)(2), not on § 410.490(b)(2). Director's Petition for Rehearing and Suggestion for Rehearing In Banc at 7-8, *Dayton*, 895 F.2d 173.[25]

[25] The Director points out (Dir. Br. at 33 n. 28) that in the comments accompanying promulgation of the DOL interim regulation, the Secretary stated that she did not believe that HEW considered its two express rebuttal tests at § 410.490(c) to be exclusive. 43 Fed. Reg. 36826 (1978). That passing unexplained observation, however, hardly constitutes the type of "thorough [ ] . . . judgment" to which deference might be owing, even if § 410.490 were a DOL regulation. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n. 5 (1978). Moreover, until he submitted his brief to this Court in this case, this observation was never tied to the interpretation of the HEW interim provision the Director now proffers. To the contrary, the Director has consistently relied on the 1978 comment about the exclusivity of the HEW interim provision's rebuttal tests as a statement supporting the very position he has now abandoned, that the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) imported these factual inquiries into the HEW interim provision. *E.g.*, Respondent Director's Petition for Rehearing and Suggestion for Rehearing En Banc at 12 n.6, *Clinchfield Coal Co.*, 895 F.2d 178 (citing 43 Fed. Reg. 36826 in support of the proposition that "[t]his interpretation of the HEW regulation [relying on the parenthetical citations to § 410.412(a)(1)]" is one that "the Department of Labor has consistently" relied upon to support the view that "all four methods of rebuttal contained in the DOL presumption" were contained in the rebuttal subsection of the HEW interim provision as well); Brief of the Federal Respondent at 19-20, *Bethenergy Mines*, 890 F.2d 1295 (citing M. Solomons, *A Critical Analysis of the Legislative History Surrounding The Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880 (1981)). (Mr. Solomons, the author of that article, was also the "principal author" of the DOL interim regulation. 43 Fed. Reg. 17766 (1978).)

b. Upon enactment of the 1978 amendments, the Secretary of Labor promulgated regulations at 20 C.F.R. Part 727. 43 Fed. Reg. 36818-31 (1978). Section 727.200 of those regulations, entitled "Basis for criteria," provided:

> In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the *criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis shall be no more restrictive* than the criteria applicable to a claim filed with the Social Security Administration on or before June 30, 1973 under Part B . . . of the Act (the interim adjudicatory rules).

§ 727.200 (emphasis added). Contemporaneously with the 1978 amendments, the Secretary therefore construed the word "criteria" in Section 402(f)(2) to include *all* criteria under the HEW interim provision, including the presence of pneumoconiosis and "disability causation" ("criteria for determining . . . total disab[ility] . . . due to pneumoconiosis").[26] Under this interpretation of the amendment, none of these criteria could be more restrictive in the DOL interim regulation than they were in the HEW interim provision.

After issuing her contemporaneous construction of Section 402(f)(2) at § 727.200, the Secretary reversed course and told the Third Circuit in *Halon v. Director, O.W.C.P.*, 713 F.2d 30 (3d Cir. 1982) ("*Halon I*") that Section 402(f)(2) *did* permit her to apply criteria under the DOL interim regulation that were less favorable than those

[26] To be sure, even though the Secretary properly construed Section 402(f)(2) in § 727.200, the DOL interim regulation failed to honor this construction by including presence of pneumoconiosis and "disability causation" factual tests for ventilatory study cases where there were none in the HEW interim provision. *See* § I.A. *supra*. In *Sebben* this Court considered a related inconsistency between § 727.200 (the DOL's regulatory *construction* of the statute) and § 727.203 (the DOL's regulatory *implementation* of the statute).

under the HEW interim provision, so long as the number of claimants treated less favorably was balanced by at least an equal number of claimants treated more favorably. Brief for the Respondent Director, O.W.C.P. at 17-19, *Halon I*. In his petition for rehearing in *Halon I*, however, the Secretary shifted to still another interpretation of Section 402(f)(2), contending that the term "criteria" in that section encompassed only "medical criteria." Petition for Rehearing on Behalf of the Director, O.W.C.P. at 2, 6-11, *Halon I*. The Secretary thereafter adhered to that position in the courts of appeals, *e.g.*, *Strike v. Director, O.W.C.P.*, 817 F.2d 395 (7th Cir. 1987), and in this Court in *Sebben*. *Sebben*, 488 U.S. at 413-14. In *Sebben*, however, this Court rejected the view that the term "criteria" in Section 402(f)(2) could be so limited. *Id.* Now in these consolidated cases, the Secretary advances a contention that seeks to deflect this Court's attention from the literal import of the term "criteria" in Section 402(f)(2). He argues, incorrectly as we have shown, that Congress cannot reasonably be understood to have read the term "criteria" to encompass presence of pneumoconiosis and "disability causation" criteria, principally because, he asserts, *other provisions of the Act* (*e.g.*, Sections 401(a), 411(c), 413(b)) make such a reading illogical. *See* pp. 35-38 *supra*.

c. The Director does not even attempt to explain the inconsistencies between the interpretations of the HEW interim provision and Section 402(f)(2) that the Secretary now advances in this Court and her prior interpretations of the same provisions. *Cf. Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."). Indeed, the only consistency we can discern among the Secretary of Labor's varying and inconsistent interpretations (other

than her contemporaneous interpretation of Section 402(f)(2) at § 727.200, which supports our position) is that she has advanced each interpretation to defeat the Section 402(f)(2) claims of miners. Because the Secretary's current interpretation of Section 402(f)(2) is one driven by the exigencies of litigation rather than by a principled search for statutory meaning, it is not entitled to deference. *See Motor Vehicle Mgrs. Assoc'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 50 (1983).

II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The coal companies argue that construing Section 402(f)(2) to invalidate the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) would violate their rights under the fifth amendment to the United States Constitution. U.S. CONST. amend V. Coal Co. Br. at 42-46. Specifically, they maintain that the requirements of the fifth amendment's due process clause demand a statutory scheme under which they are afforded an opportunity to avoid liability for payment of any black lung benefits to claimants like Mr. Dayton if they can prove either that the claimants do not have pneumoconiosis or that their disabilities did not arise out of coal mine employment. *Id.* Similarly, the Director—who, as a government official, has no standing to raise any due process challenge to Section 402(f)(2)—says that if that section were construed to bar coal operators from avoiding liability for black lung benefits by proving either that a claimant does "not have pneumoconiosis or . . . [is] not disabled by it," then a "serious constitutional question would be presented." Dir. Br. at 29.[27] The due process objections of the coal companies and the Director are thus to the statutory *liability* scheme that they posit exists if our interpretation of Section 402(f)(2) prevails.

[27] The Director, however, takes no position as to how that constitutional question should be resolved if this Court were to decide it.

As the coal companies acknowledge, in the court below Consolidation Coal Company did not raise the constitutional issue it presses here, and the Director raised the issue only as an adjunct to his *statutory* argument. Coal Co. Br. at 42 n. 49. Accordingly, the court of appeals, citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), declined to consider the constitutional issue. Pet. App. at 6. Some question therefore exists as to whether the constitutional issue has been properly preserved in this case. *See Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The coal companies' contention that Section 402(f)(2), as we construe it, is constitutionally infirm is without merit in any event. For the due process objections of the coal companies and the Director are to a statutory liability scheme that does not exist. As petitioner Pauley and we have explained in some detail, Section 422(c) of the Act, 30 U.S.C. § 932(c), allows every operator to avoid *liability* for payment of any black lung benefits in a ventilatory study case, though not defeat the entitlement of the claimant to receive benefits from the Trust Fund, if it can show that the claimant does not have pneumoconiosis or that his disability does not arise out of pneumoconiosis. *See* 89-1714 Pet. Br. at 45-46 and n. 22 *supra*. As in No. 89-1714, an x-ray case, Section 422(c) therefore "completely answers" the constitutional challenge in ventilatory study cases like Mr. Dayton's. 89-1714 Pet. Br. at 48.

Also as in No. 89-1714, and for reasons similar to those petitioner Pauley explains there (89-1714 Pet. Br. at 48-49), Section 402(f)(2) as we construe it in a ventilatory study case would be constitutional even if the Act did not in-

clude a provision like Section 422(c). As the coal companies and the Director acknowledge (Coal Co. Br. at 42; Dir. Br. at 30), Section 402(f)(2) enjoys a strong presumption of constitutionality and could only be found to be constitutionally invalid if this Court concluded that, as we construe the section, it is "arbitrary and irrational." *Turner Elkhorn Mining*, 428 U.S. at 15.

The determination of whether Section 402(f)(2) is "arbitrary and irrational" must be made in terms of its "operation and effect." *Id.* at 24. Section 402(f)(2), when construed to invalidate the "disability causation" and presence of pneumoconiosis rebuttal tests at §§ 727.203(b)(3) and (b)(4) with respect to ventilatory study cases, has the "effect" of affording benefits to miners (1) who have worked at least ten years in the mines, (2) who have a chronic respiratory or pulmonary impairment, (3) whose impairments prevent them from performing their usual coal mine work or its equivalent, (4) whose respiratory or pulmonary impairments are probably, albeit not certainly, pneumoconiosis, and (5) whose inability to perform their usual coal mine work or its equivalent probably, albeit not certainly, arose out of their long term (at least 10 years) coal mine work. *See* pp. 28-29 and n. 21 *supra*. Congress' decision in Section 402(f)(2) to award such miners benefits was not irrational, but, as explained in 89-1714 Pet. Br. at 10-12, 38-43 and at pp. 26-29 and n. 21 *supra*, was the expression of a carefully crafted congressional compromise that incorporated into the statute reasonable "policy choices as a price for conducting programs for the distribution of social . . . benefits." *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975); *see also Mourning v. Family Publications Service*, 411 U.S. 356, 377 (1973). Accordingly, Section 402(f)(2) is the same in constitutional terms as "§ 411(c)(3)'s 'irrebuttable presumption' of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis," the constitutionality of which this

Court unanimously upheld in *Turner Elkhorn Mining*, 428 U.S. at 22. *Turner Elkhorn Mining* therefore dooms the coal companies' constitutional challenge to Section 402(f)(2) here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS R. MICHAEL
(Counsel of Record)
MICHAEL & KUPEC
228 Court Street
Clarksburg, West Virginia 26301
(304) 623-6678

Attorney for Respondent
ALBERT C. DAYTON (No. 90-114)

BEST AVAILABLE COPY

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,

Respondents.

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,

Respondents.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

In *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), this Court determined that the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(b) (1990), was invalid under 30 U.S.C. § 902(f)(2) to the extent that it denied access to the presumption of total disability or death due to coal workers' pneumoconiosis to miners with less than ten years of coal mine employment but who were, nevertheless, able to demonstrate through x-ray or biopsy evidence that they had the disease.

Left unresolved in that decision and now presented for resolution are the following issues:

1. Whether the rebuttal provisions of the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(b) (1990), are invalid under 30 U.S.C. § 902(f)(2) because they permit denial of a claim where the medical evidence proves that the miner does not or did not have coal workers' pneumoconiosis or is not disabled or did not die, in whole or in part, due to his pneumoconiosis.

2. Whether the rights of coal mine operators and their insurers under the Due Process Clause of the Fifth Amendment of the Constitution of the United States are violated by an interpretation of 30 U.S.C. § 902(f)(2) which precludes those operators from defending black lung claims by proving that the miner did not or does not have coal workers' pneumoconiosis or that a miner's disability or death did not result in whole or in part from coal mine employment.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John C. Pauley ("Pauley") was a claimant for benefits under the Black Lung Benefits Act. While this matter was pending resolution in the United States Department of Labor, Benefits Review Board, ("BRB"), John Pauley died and is survived by his widow, Harriet Pauley. John Pauley was the respondent below. By decision of the Benefits Review Board Nunc Pro Tunc issued August 14, 1990, Harriet Pauley, now the petitioner, was substituted for the decedent.

Petitioner below and now respondent, BethEnergy Mines Inc., formerly Bethlehem Mines Corporation, is a wholly owned subsidiary of the Bethlehem Steel Corporation. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Legislative Facts	6
C. Pauley's Case	10
SUMMARY OF ARGUMENT	12
ARGUMENT	13
A. Introduction	13
B. The Department Of Labor's Interim Presumption Is Not Invalid Because It Permits A Factual Inquiry Into Whether A Miner's Total Disability Is In Some Way Related To Pneumoconiosis	14
C. The Court Should Not Impose Liability On The Black Lung Trust Fund In Claims Lacking A Connection Between A Miner's Total Disability And Coal Mine Dust Related Disease	20
CONCLUSION	23

TABLE OF AUTHORITIES

	PAGE
CASES:	
Bowen v. City of New York, 476 U.S. 467 (1986)	19
Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990)	5
Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co., 598 F.2d 945 (5th Cir. 1979)	21
Director, Office of Workers' Compensation Programs v. Leckie Smokeless Coal Co., 598 F.2d 881 (4th Cir. 1979)	21
Director, Office of Workers' Compensation Programs v. South East Coal Co., 598 F.2d 1046 (6th Cir. 1979)	21
Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983)	18
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	11
Pittston Coal Group v. Sebben, 488 U.S. 105 (1988)	i, 3, 4, 5
Republic Steel Corp. v. Director, Office of Workers' Compensation Programs, 590 F.2d 87 (3d Cir. 1978)	21
Sulyma v. Director, Office of Workers' Compensation Programs, 827 F.2d 922 (3d Cir. 1987)	11
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	22

	PAGE
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. V	2, 13
STATUTES AND REGULATIONS:	
26 U.S.C. § 9501(d)(l)(B) (1988)	20
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988)	2
Section 401(a), 30 U.S.C. § 901(a) (1988)	2, 11
Section 402(f), 30 U.S.C. § 902(f) (1988)	2
Section 402(f)(1), 30 U.S.C. § 902(f)(1) (1988)	3, 17
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988)	*passim*
Section 402(f)(2)(C), 30 U.S.C. § 902(f)(2)(C)	3
Section 411(c)(3), 30 U.S.C. § 921(c)(3) (1988)	12
Section 411(c)(4), 30 U.S.C. § 921(c)(4) (1988)	15, 18
Section 413(b), 30 U.S.C. § 923(b) (1988)	2, 15
Sections 421-435, 30 U.S.C. §§ 931-945 (1988)	3
Section 422(a), 30 U.S.C. § 932(a) (1988)	21, 22
Section 422(c), 30 U.S.C. § 932(c) (1988)	2, 20, 22
Section 422(h), 30 U.S.C. § 932(h) (1988)	21
Section 422(k), 30 U.S.C. § 932(k) (1988)	ii, 21

	PAGE
Section 435, 30 U.S.C. § 945 (1988) . . .	3
Section 435(a), 30 U.S.C. § 945(a) (1988)	16
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 151 (1972)	22
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 12 (1978) . .	22
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, as amended	*passim*
Rules of the U.S. Supreme Court, Rule 29.1	ii
Black Lung Program Regulations	
20 C.F.R. § 410.412(a)(l) (1990)	17
20 C.F.R. §§ 410.424-410.426 (1990) . . .	17
20 C.F.R. § 410.426(a) (1990)	18
20 C.F.R. § 410.490 (1990)	*passim*
20 C.F.R. § 410.490(a) (1990)	18
20 C.F.R. § 410.490(b)(2) (1990)	5, 17, 19
20 C.F.R. § 410.490(b)(3) (1990)	17, 19
20 C.F.R. § 410.490(c) (1990)	4, 17, 19
20 C.F.R. § 410.490(c)(2) (1990)	17
20 C.F.R. Part 718 (1990)	3
20 C.F.R. § 725.492 (1990)	21
20 C.F.R. § 725.493 (1990)	21
20 C.F.R. § 727.203 (1990)	2, 3
20 C.F.R. § 727.203(a)(1) (1990)	10
20 C.F.R. § 727.203(b) (1990)	i
20 C.F.R. § 727.203(b)(2) (1990)	5

	PAGE
20 C.F.R. § 727.203(b)(3) (1990)	*passim*
20 C.F.R. § 727.203(b)(4) (1990)	5, 12, 13
MISCELLANEOUS:	
H.R. 7, 94th Cong., lst Sess. (1975)	9
H.R. 10760, 94th Cong., lst Sess. (1975) . .	9
Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., lst Sess. (1977)	6, 7, 9, 16, 19
S. Rep. No. 743, 92d Cong., 2d Sess. (1972)	14, 15
H.R. Rep. No. 151, 95th Cong., 2d Sess. (1977)	10, 16
H.R. Rep. No. 864, 95th Cong., 2d Sess. (1978)	8, 16
124 Cong. Rec. 2330 (1978)	8
Comptroller General of the U.S., *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and their Survivors — Improvements Are Needed* (1977)	19

Nos. 89-1714, 90-113 and 90-114

IN THE

Supreme Court of the United States

October Term, 1990

HARRIET PAULEY, survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

BRIEF FOR RESPONDENT BETHENERGY MINES INC.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are relied upon by the Respondent, BethEnergy Mines Inc.:[1]

1. The Fifth Amendment to the Constitution of the United States.

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988).

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). (*Pauley* App. 46-47.)

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988).

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988).

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1990). (*Pauley* App. 50-53.)

7. The Department of Labor Interim Presumption. 20 C.F.R. § 727.203 (1990). (*Pauley* App. 48-50.)

STATEMENT OF THE CASE

A. INTRODUCTION

These consolidated cases seek this Court's review of the validity of certain black lung eligibility regulations published by the United States Department of Labor ("DOL") in 1978 in an effort to comply with the requirements of section 402(f)(2) of the Black Lung Benefits Act, as amended.[2] 30

[1] The Solicitor General's Motion to Dispense with the printing of a Joint Appendix in No. 89-1714 was granted on December 3, 1990. All necessary materials are reprinted in the Appendix to the Petition for Writ of Certiorari. In this brief, citations to (*Pauley* App.) refer to the Appendix to the Petition for Writ of Certiorari filed by Harriet Pauley in 89-1714.

[2] 30 U.S.C. 901-945 (1988) (the "Act").

U.S.C. § 902(f)(2). Portions of the Act administered by DOL create a privately funded federal workers' compensation program with the limited purpose of compensating total disability or death due to coal mine employment related pneumoconiosis ("black lung" disease).[3]

The Act was amended in 1978 to achieve a variety of objectives, among which was the liberalization of the criteria applied by DOL and SSA in determining a claimant's eligibility for benefits. Liberalized criteria were to be retroactively applied by the agencies to all previously denied and pending claims. 30 U.S.C. § 945; *Pittston Coal Group*, 488 U.S. at 110, 122. A provision in the 1978 amendments, *i.e.*, 30 U.S.C. § 902(f)(2), required DOL to promulgate eligibility criteria for applications in previously filed claims and certain new claims[4] that were no more restrictive than the criteria used by SSA in claims filed with the agency.

The centerpiece of SSA's pre-July 1, 1973 eligibility criteria is a regulation called the "interim presumption." 20 C.F.R. § 410.490 (1990). In compliance with section 402(f)(2) of the Act, DOL adopted its version of the interim presumption at 20 C.F.R. § 727.203 (1990). Both sets of interim criteria compel a presumption of a claimant's entitlement to benefits under the Act if the claimant proves the fact or facts

[3] Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 931-945. The Part C program began on July 1, 1973, and established a black lung compensation scheme for claims filed on or after that date. Claims filed between December 31, 1969 and June 30, 1973, are called "Part B" claims. Part B claims were filed with and adjudicated by the Social Security Administration ("SSA"). Benefits paid in approved Part B claims are publicly funded. See *Pittston Coal Group v. Sebben*, 488 U.S. 105, 109 (1988).

[4] DOL was also authorized by the 1978 provisions to write new permanent eligibility regulations for applications in claims filed after their promulgation. 30 U.S.C. § 902(f)(1), (2)(C). The new rules were adopted effective April 1, 1980, and apply to all claims filed on or after that date. 20 C.F.R. Part 718 (1990). Accordingly, claims filed between the date of enactment of the 1978 amendments and March 31, 1980, are also subject to the requirements of section 402(f)(2) of the Act.

that are prescribed in each rule for invocation of the presumption. Both presumptions are expressly rebuttable. The two presumptions are, however, designed and worded differently in several respect.

In *Pittston Coal Group*, this Court struck down the segment of DOL's invocation provisions limiting the availability of the DOL presumption to those cases involving miners with ten or more years of coal mine employment. In comparing DOL's rule to SSA's in this regard, this Court observed that SSA's rule did not invariably require ten years of employment if the claimant proved the existence of pneumoconiosis by x-ray, biopsy, or autopsy evidence. A shorter term miner could benefit from the SSA rule if other proof connected the diagnosed condition to coal mine dust exposure. This option was not available to the DOL claimant. This difference between the two presumptions was clear, and, in the opinion of the Court, unauthorized in light of the plain language of section 402(f)(2) of the Act prohibiting the adoption of more restrictive criteria by DOL. *Pittston Coal Group*, 488 U.S. at 114.

Pauley's appeal asks this Court to invalidate one of the rebuttal segments of the DOL rule on the same theory. In particular, John Pauley was, when he filed for benefits with DOL, totally disabled from work. His disability was, however, entirely unrelated to black lung disease. He was disabled by arthritis and the residual effects of a stroke. DOL's interim presumption expressly provides that rebuttal will occur if "evidence establishes the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3). Because this fact was proven in Pauley's case, the claim was denied.

The text of the SSA presumption does not expressly state that rebuttal will lie on this basis. *See* 20 C.F.R. 410.490(c). Pauley contends, therefore, that SSA's rule is less restrictive than DOL's because the "disability causation" inquiry permitted by DOL in a rebuttal analysis was not a material or

relevant factor in determining an SSA claimant's entitlement for benefits under section 410.490. The cause of a miner's total disability is, according to Pauley, irrebuttably presumed under the SSA rule, and the same irrebuttability must be operative under the DOL rule. Since DOL's rule permits factual inquiry in this regard, it violates section 402(f)(2) of the Act.

The court of appeals found no viable support for Pauley's theory either in *Pittston Coal Group*, the Act or the texts of the rules. (*Pauley* App. 8-18.) The court below refused to award black lung disability benefits on account of disabilities entirely unrelated to black lung disease. Bethlehem Mines urges the Court to affirm.[5]

---

[5] In the cases consolidated with Pauley's, *Clinchfield Coal Co. v. Director, Office of Workers' Compensation Programs*, No. 90-113, and *Consolidation Coal Company v. Director, Office of Workers' Compensation Programs*, No. 90-114, benefits were denied under DOL's provision mandating rebuttal if: "The evidence establishes that the miner does not, or did not, have pneumoconiosis." 20 C.F.R. § 727.203(b)(4). In *Clinchfield Coal*, rebuttal was also proper under the (b)(3) rebuttal method and in *Consolidation Coal* rebuttal was also proven under DOL's (b)(2) rebuttal method (miner not totally disabled). In these cases, the Fourth Circuit held that the absence in SSA's rule of a rebuttal provision equivalent to section 727.203(b)(4) invalidated DOL's rule in this regard. *See Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 176 n. * (4th Cir. 1990) (The fact that the miner does not suffer from pneumoconiosis "is superfluous and has no bearing on this case."). Mrs. Pauley agrees, in effect, that the Fourth Circuit erred in striking down section 727.203(b)(4). *See* Pauley's Brief at 20-21. Although the concession is expressly limited to "x-ray cases like Mrs. Pauley's," it rests ultimately on the unstated premise that no section 410.490 claimant may satisfy the affirmative factors necessary for invocation until the existence of pneumoconiosis is proven by the claimant. *Id.* at 22 nn. 11, 12. Since Pauley's concession is compelled by this Court's reading of 20 C.F.R. § 410.490(b)(2) in *Pittston Coal Group*, 488 U.S. at 113, and because section 410.490(b)(2) as well as the provisions it incorporates by reference apply with equal force to all SSA invocation methods, not just the x-ray method, Pauley's attempt to preserve something for the Fourth Circuit claimants to argue is fatally flawed.

B. LEGISLATIVE FACTS

The history and evolution of the Act and the two interim presumptions are set forth in detail in the Brief of the Director, Office of Workers' Compensation Programs and the Joint Brief for Petitioners Clinchfield Coal and Consolidation Coal. There are no significant differences apparent between the government and the coal companies in these discussions. BethEnergy is in agreement with the historical discussions and need not burden the Court with a reiteration.

There are, however, several misleading or inaccurate historical references in Pauley's brief that merit brief comment. First, both Pauley's Brief and the Brief of Amicus Curiae United Mine Workers of America in Support of Claimant and Petitioner argue that section 402(f)(2) of the Act reflects a congressional compromise between an "industry" proposal preferring the development of new eligibility criteria by DOL and groups representing coal miners which preferred the application of an interim presumption in all claims. *See* Pauley's Brief at 12, 41. This is not accurate. Neither the coal industry nor the insurance industry, in the final statements to the Congress in 1977, proposed any eligibility amendments to the existing 1972 statute. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., lst Sess. (1977) 102 ("*1977 Senate Hearings*") (statement by Carl E. Bagge, President, National Coal Ass'n: "The coal industry does not believe that the existing statute needs to be amended."); *id.* at 119-136 (insurance industry statements warning that certain irrebuttable presumptions proposed by the House of Representatives (but not ultimately enacted) were inappropriate and uninsurable).

The only participant in the legislative process seeking DOL authority to promulgate new eligibility criteria for all

claims was the Department of Labor staff.[6] DOL's view was that the SSA interim standards were confusing and that the ventilatory criteria for invocation of the SSA presumption were inappropriate:

> Well, as I understand it, the interim medical standards are used as a preliminary screening mechanism for Part C[7] claims, but there is concern that they may not be medically supportable as standards for total disability.
>
> Under the Department of Labor's adversary procedure, Senator, expert medical testimony may be able to rebut a determination of total disability based on the interim standards.
>
> For example, one of the major problems with both the title IV and the interim ventilatory standards is that . . . the breathing level represented as "total disability" under the interim standards is actually the medically predicted "normal" for miners 65 or older and may be restrictive for younger miners.
>
> There are also questions about how you use blood gas tests. There are questions about the use of the interim standards as to what do they really mean when you have to actually explore it as a medical expert and, again defend it before a hearing?

Id. at 146-47 (statement of Assistant Labor Secretary Elisburg). Elisburg's question concerning the "real meaning" of the SSA interim standards was never answered in either

---

[6] Neither the insurance industry nor the coal industry had any reason to believe that the Department of Labor and the administration of President Carter, who strongly supported the liberalization of the black lung program, would be inclined to write eligibility rules acceptable to the industries.

[7] Elisburg probably meant to refer here to Part B claims, since the interim standards were not, at that time, applicable at all in Part C claims.

House of Congress or by any witness. It is quite likely that no one knew the answer beyond the general assumption that the Part B approach was liberal and would lead to the approval of more Part C claims. The House/Senate compromise that mandated DOL's adoption of interim standards for the group of claims identified in 30 U.S.C. § 902(f)(2) reflected only this understanding and nothing more. It certainly did not mediate any identifiable disagreement between miners and coal companies over "disability causation" or any other specific "criteria". The compromise was reached solely on the understanding reflected in the Conference Committee's report directing DOL to publish a version of SSA's criteria ensuring the consideration of all relevant evidence in the Part C adjudication. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 *reprinted in* 1978 U.S. Code Cong. & Admin. News 309; *see also* 124 Cong. Rec. 2330, 2333 (1970) (statement of Congressman Perkins). Beyond this, Pauley's attempt to draw precise meaning from the Congressional agreement to apply interim presumptions in Part C claims ultimately fails because it is not supported by any apparent authority.

In this same vein, Pauley's emphasis on legislative materials purporting to demonstrate "that it is virtually impossible to determine to what extent, if any, miners' disabilities or deaths can be attributed to CWP," Pauley's Brief at 6, is misleading and irrelevant. It is not virtually impossible, or even difficult, to identify the cause of a disability or death when either event is attributable to an auto accident, gun shot wound or clearly non-respiratory disease. It may be difficult if the cause is a respiratory disease, but even in this context there is no indication whatsoever that Congress was dissatisfied with a presumption that shifted this so-called impossible burden to the employer.[8] An attempt was made in 1977 by the House of Representatives to make the presumed connection

[8] It is, of course, difficult to make a disability causation distinction in some cases and in those cases the claimant almost always prevails under DOL's section 727.203(b)(3).

between long-term employment and disability or death irrebuttable. *See e.g.* H.R. 10760, 94th Cong., lst Sess. § 2 (1975); H.R. 7, 94th Cong., lst Sess. § 3 (1975). These proposals were not adopted.

There is nothing in the legislative record supporting the theory that their attempt carried over into the congressional decision to deploy interim criteria in Part C claims. There is nothing whatever in the legislative materials suggesting that "disability causation" was an irrebuttable element in the SSA interim approval, or that Congress intended to immunize this element in any case from scrutiny in light of evidence in a claim record.

The only definitive interpretation of the meaning of the SSA presumption conveyed to Congress was supplied by Assistant Secretary Elisburg in 1977, *see infra* p. 7 and Labor Solicitor Kilberg in 1974. In an early effort to have SSA apply its interim presumption to DOL claims, Kilberg wrote to his counterpart in HEW requesting uniform standards for all claims. Kilberg noted that the Senate Report language suggesting special interim adjudicatory rules did not justify different standards for DOL claims:

> It only directs Social Security to make a lesser effort to rebut the evidence submitted by a backlog of claims. . . . It has been pointed out that the interim criteria do no more than establish a rebuttable presumption of eligibility for benefits. The criteria by their terms set forth a number of avenues of rebuttal. A rebuttable presumption suffers from constitutional infirmity only if it is, in fact, irrebuttable. . . . This is clearly not the case with respect to the interim criteria. Any coal operator has ample opportunity and resources available to him to present sound medical evidence tending to rebut the presumption of eligibility created by the interim presumption. . . . Expert medical testimony, as well

> as claimant's active work responsibilities, are only two examples of rebutting evidence. . . . "

H.R. Rep. No. 151, 95th Cong., lst Sess., 18-19 (1977).

The implication that Congress intended irrebuttability as to disability causation or any other factor cannot be demonstrated.

C. PAULEY'S CASE

John Pauley worked as a miner for thirty years. He had early stage, simple coal worker's pneumoconiosis. On April 21, 1978, he filed a claim for benefits under the Act. (*Pauley* App. 3-4.) His case was tried before an administrative law judge ("ALJ"). DOL's interim presumption applied to Pauley's claim and was invoked by x-ray proof of pneumoconiosis. 20 C.F.R. § 727.203(a)(1). (*Pauley* App. 35-36.) As dramatically portrayed in Petitioner Pauley's Statement (*see* Pauley's Brief at 2), the miner had many symptoms and did have some serious medical problems but since none of these conditions had anything to do with his employment as a coal miner, after review of all pertinent evidence, the ALJ concluded that the presumption was rebutted under 20 C.F.R. § 727.203(b)(3) by proof that Pauley's disability did not arise in whole or in part out of coal mine employment. (*Pauley* App. 37-38.)[9]

[9] These findings have never been challenged. (*Pauley* App. 5.) Now, however, Pauley argues the ALJ inaccurately categorizes the medical opinion and accordingly improperly weighs the evidence in coming to the conclusion that rebuttal under section 727.203(b)(3) is satisfied. *See* Pauley's Brief at 14 n.9. This substantial evidence challenge has long since been abandoned, having not been preserved before the BRB or in the court of appeals. "After a thorough weighing of the evidence the judge concluded that Bethenergy 'has sustained its burden of establishing that pneumoconiosis is not a contributing factor in [Pauley's] disability' and thus had succeeded in rebutting the presumption in Pauley's favor [footnote omitted]. *This finding is not challenged on this appeal.*" (*Pauley* App. 5; emphasis added.)

The ALJ then considered the claim under SSA's rule and found invocation based upon Pauley's admitted pneumoconiosis. He further determined that rebuttal was not available because Pauley was totally disabled due to conditions that had nothing to do with his coal mine employment; namely, arthritis and a residual hemiparesis. (*Pauley* App. 39.) The ALJ awarded benefits, determining the fact that Pauley's total disability had nothing to do with his coal employment was irrelevant under SSA's rule. (*Pauley* App. 40.)[10] The BRB affirmed. (*Pauley* App. 21-22.)

On appeal, the Third Circuit reversed. (*Pauley* App. 19.) The court was troubled by the fact that Pauley's entitlement depended upon which presumption was used. The court concluded that the statute controlled and benefits were not available to Pauley because the Act provided benefits only to miners totally disabled, at least in part, by pneumoconiosis arising out of coal mine employment. (*Pauley* App. 12 citing 30 U.S.C. § 901(a); *Mullins Coal Co.*, 484 U.S. 135, 141 (1987).) The court held that disability causation rebuttal is implicit both under SSA's and DOL's regulations and the Act. (*Pauley* App. 14-19.)

Predominant in the court's reasoning are two inexorable concerns: (l) " . . . no set of regulations under it [the Black Lung Benefits Act] may provide that a claimant who is statutorily barred from recovery may nevertheless recover" and (2) " . . . the only way in which we [the Court] can affirm the Benefits Review Board [the award] is to hold that even though BethEnergy should, on the law and facts, have prevailed under the Benefits Act, by reason of the presumptions and

[10] The administrative law judge relied on *Sulyma v. Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987), for the proposition that "disability causation" was not a proper rebuttal inquiry under SSA's rule but, such an interpretation was specifically rejected by the decision's author, Circuit Judge Morton I. Greenberg. (*Pauley* App. 18-19.)

limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result." (*Pauley* App. 13-14.)

The Third Circuit holds that absent an irrebuttable presumption,[11] coal mine operators are free to defend black lung claims by demonstrating that the miner's death or disability did not arise in whole or in part out of coal mine employment. (*Pauley* App. 12-13.)

SUMMARY OF ARGUMENT

Depriving operators the vehicle of disability causation rebuttal would require the payment of benefits to coal miners who do not have coal workers' pneumoconiosis or attendant disability, contrary to the Act and in derogation of due process of law. The affirmative arguments made by the Solicitor General with coal mine operator petitioners in the consolidated cases are adopted by BethEnergy: 20 C.F.R. § 727.203(b)(3), (4) are valid.

Petitioner Pauley's argument requires this Court to determine that SSA's rules as applied are contrary to the express limitation of the Act, that its benefits are available

---

[11] The Third Circuit rejected Pauley's contention that SSA's presumption is irrebuttable as to the cause of the presumed total disability.

> We point out that when Congress wants to make a presumption irrebuttable so as to establish entitlement it knows how to do so. An irrebuttable presumption of total disability arises under 30 U.S.C. § 921(c)(3) if the evidence shows that the miner has a complicated case of coal miner's pneumoconiosis as defined in the subsection. In the event a miner may receive benefits even if there is other evidence that the miner can do his usual coal mine work or other comparable and gainful work. [citation omitted.] There is, however, no indication that Congress had any intention to make the presumption invoked here on behalf of Pauley paramount over a showing by Bethenergy that Pauley did not qualify for benefits under the Benefits Act. We also observe that our result eliminates possible due process problems raised by the Director.

(*Pauley* App. 13.)

only to persons whose death or total disability was caused by pneumoconiosis. It then requires the conclusion that Congress knew of this deceptive practice, that it sanctioned this deception, and ultimately directed its adoption by the Secretary of Labor.

There is no compelling argument advanced by Pauley in support of this proposition. There is no legislative history supporting Congress's desire to eliminate the statutory requirement that compensable death or total disability be caused by coal workers' pneumoconiosis. Certainly there is no statutory provision which so states.

Pauley's endeavor to transfer claim liability to the Trust Fund where a responsible operator successfully defends a claim on the basis of disability causation rebuttal has no statutory authority or even vague support. It is clearly not the purpose for which the Fund was established.

The Third Circuit's resolution of the claim of John Pauley is correct and must be affirmed. There is neither statutory nor constitutional tolerance for the payment of black lung benefits to miners who are not disabled as a result of coal workers' pneumoconiosis.

ARGUMENT

A. INTRODUCTION

BethEnergy joins in the affirmative arguments made by the Solicitor General with coal mine operator petitioners in these consolidated cases, defending the validity of 20 C.F.R. § 727.203(b)(3), (4). BethEnergy also joins in suggestions that the retroactive imposition of liability on mine owners for the total disability or death of their employees whether or not there is a relationship between the disability or death and the employment relationship violates the rights of the operators under the Due Process Clause of the Fifth Amendment to the United States Constitution. Further elaboration by

BethEnergy is unnecessary. Several of the points raised by Pauley do, however, merit further comment.

B. THE DEPARTMENT OF LABOR'S INTERIM PRESUMPTION IS NOT INVALID BECAUSE IT PERMITS A FACTUAL INQUIRY INTO WHETHER A MINER'S TOTAL DISABILITY IS IN SOME WAY RELATED TO PNEUMOCONIOSIS

DOL's adoption of a disability causation rebuttal test is entitled to some respect unless it is plainly prohibited by the Act. The plain text of the Act contains no such prohibition. Accordingly, Pauley's argument seeking invalidation of DOL's disability causation rebuttal provision disintegrates unless it demonstrates with some degree of clarity that SSA's rules preclude consideration of this element of the eligibility equation. Pauley's arguments fall far short of identifying such proof. These interdependent focal points provide the coordinates of Pauley's argument: SSA's rules of behavior, section 402(f)(2) of the Act, and Congress's intent. The resulting contrivance is speculative, most likely inaccurate, and not persuasive.

Starting at the base of this pyramid, Pauley posits two assumptions concerning Congress's intent. First, it is assumed that in 1972, when the Senate Committee suggested SSA's adoption of interim rules, *see* S. Rep. No. 743, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2304, 2322-23, it was expected that SSA would eliminate disability causation as a fact element in the cases decided under these rules. This intent is derived from a 1972 Comptroller General's report conveying SSA's belief that it was "virtually impossible" to differentiate disability caused by pneumoconiosis from that caused by other lung diseases, and from Congress's desire to expedite the adjudication of claims. Next, it is assumed that in 1977 Congress was aware that SSA did, in fact, eliminate disability causation as a fact element within the confines of SSA's

interim presumption, and that legislators wanted DOL to follow the same pattern.

The two assumptions are undocumented and illogical. Congress did not in 1972 or thereafter express either intention directly or by clear inference. If in 1972 or 1978, Congress intended to dramatically alter the eligibility equation by eliminating one of its critical elements, one would expect to find some kind of statement to that effect. By all appearances it seems that Congress in 1972 thought it had adequately addressed the diagnostic difficulties and related proof problems facing miners by the adoption of the fifteen-year respiratory disease presumption, 30 U.S.C. § 921(c)(4), by limiting the significance of negative chest x-rays, and by requiring the consideration of all relevant medical evidence, *id.* 923(b). *See* S. Rep. No. 743 *supra*, p. 14 at 8-116. The "interim evidentiary rules and disability evaluation criteria" envisioned in the Senate Report were mandated by the language in the Report to compensate for the lack of adequate medical testing facilities in mining regions and to allow speedy awards based upon medical testing that was then available. *Id.* at 18. In no way does this authorizing language imply any fundamental change in the statutory eligibility equation.

There is, moreover, not a hint that the Senate expected SSA to compensate disabilities that were unrelated to respiratory or pulmonary disease. Pauley's insistence that disability causation was designed to be irrebuttable no matter what kind of health defect the miner suffered cannot be extracted from anything stated in the 1972 proceedings.

Subsequent proceedings leading to the adoption of the 1978 amendments provide nothing to sustain Pauley's theory of Congress's intent in 1972. The only direct information provided to Congress in this period was that SSA did not take

an adversarial role in claims adjudication[12] despite the fact that SSA's presumption was rebuttable in light of any relevant rebuttal evidence. *See* H.R. Rep. No. 151 *supra* p. 10 (Kilberg letter). If anyone, whether a Congressional witness or member of Congress believed that SSA's section 410.490 presumption was in any way irrebuttable, that belief was not stated.[13] In the legislative proceedings culminating in the 1978 amendments, there is no discussion at all suggesting that section 410.490 precluded factual inquiry into the disability causation element.

The foundation of Pauley's theory lies in the premise that Congress purposefully directed first SSA and then DOL to adopt interim evidentiary rules making disability causation irrelevant or irrebuttably presumed. There is no proof of that at all and some persuasive evidence to the contrary.

Pauley's statutory and regulatory arguments falter as well for their lack of foundation or rationality. There is, of

[12] Both DOL Solicitor Kilberg in 1974 and Assistant Secretary Elisburg in 1978 informed Congress that SSA used its interim presumption as a screening device. *See infra* pp. 7, 10. A claim was "screened in" when the claimant met the invocation criteria in section 410.490. Since SSA made little effort to challenge a claimant's evidence or to explore presumed facts with independent evidence, the screening in was tantamount to an award. Congress knew that in DOL cases mine operators would not passively defend themselves and in the often cited language of the 1978 Conference Report told DOL not to require a passive defense. H.R. Rep. No. 864, *supra* at p. 8. The floor debates addressing the disagreement between Senate and House conferees over whether HEW, like DOL, was now going to be more active in defending claims received by SSA under 30 U.S.C. § 945(a) (*i.e.*, consider all relevant evidence), served only to caution SSA not to abandon its passive strategy. *See infra* pp. 7-8.

[13] The adoption of SSA's interim presumption for DOL claims was widely criticized. None of the testimony or statements made in opposition, however, other than DOL's objections to the pulmonary function test criteria, defined the reasons for opposing such adoption with any specificity. It is likely that industry witnesses knew of the presumptions' general liberality, and opposed it for this reason alone.

course, no plain language in the Act per se to lend even a hint of support to the irrebuttability theory. To advance it, Pauley must segregate section 402(f)(2) of the Act not only from the Act as a whole but from the section in which it appears. *See* Pauley's Brief at 33 n.22 (notes that section 402(f)(2) is not in the same subparagraph as the material in section 402(f)(1).) Having done so, Pauley need not clutter her arguments with the specific provisions of the Act but is free to attempt to penetrate section 410.490 in isolation.

But even this degree of linguistic surgery is not good enough to clear the screen for Pauley's argument. It is still necessary to excise the references in section 410.490(c) to 20 C.F.R. § 410.412(a)(1) and the specific provisions of section 410.490(b)(2), (3). After eliminating any regulatory or statutory provision suggesting a disability causation element, Pauley is then free to announce that there is none.[14]

The affirmative proof that no disability causation inquiry was written into the SSA rule is derived, in Pauley's argument, from an internal Manual used by SSA, the absence of judicial interpretations of the SSA presumption demonstrating a disability causation prong to the eligibility inquiry and Congress's concern over proof difficulties faced by claimants. None of these sources are substitutes for the plain language of the Act, which clearly contemplates a disability causation inquiry in all disability claims, or the reasonably inclusive incorporation by reference in the SSA rules nor are

[14] With respect to the cross-references in 20 C.F.R. § 410.412(a)(1) to sections 410.424-410.426, Pauley argues that the meaning derived from the references must be limited to those segments of sections 410.424 and 426 that refer to "comparable and gainful work". Thus, Pauley concludes that disability alone and not disability causation is the only inquiry provided by the overall cross-references from section 410.490(c)(2) to section 410.412(a)(1) to sections 410.424 and 426. Although we would hesitate to attribute a great deal of precision to SSA's drafting of its regulations, there is no apparent reason to limit SSA's incorporations to exclude any part of the material that is incorporated. Pauley's attempt to do so is strained and unexplained.

these authorities independently compelling. If Congress was aware of and agreed with the 1972 Comptroller General's report[15] stating the view of some unnamed person at SSA that disability causation was a "virtually impossible" inquiry in a black lung claim, it does not follow that Congress responded by making disability causation irrebuttable under SSA's interim rules. Since the "virtually impossible" problem would arise only in connection with a pulmonary disease related disability it would have been monumental overkill for SSA to have written a rule embodying the virtual impossibility of a differential diagnosis where disability was caused, for example, by a brain tumor, an accident, or the myriad of other illnesses that afflict the human body. It is far more logical to assume that SSA would address this difficulty by merely relieving the claimant of the burden of proving disability causation. This is a much more likely explanation for what SSA did, and it is the approach that is fully consistent with the evidentiary changes made by Congress in the 1972 adoption of the statutory fifteen-year presumption. 30 U.S.C. § 921(c)(4) (rebuttably presuming total disability due to pneumoconiosis if the miner was totally disabled by a respiratory or pulmonary disease and had fifteen years of mine employment); *see also* 20 C.F.R. § 410.490(a).

The absence of published case law under SSA's rule is no help.[16] SSA neither developed rebuttal evidence nor did it view its role as adversarial. In 1977 SSA informed the Comptroller General that it had no resources or mandate to actively

[15] The report is not mentioned in the 1972 legislative record, so far as has been determined.

[16] In one decision arising under SSA's presumption in which disability causation is discussed, it appears that SSA argued in favor of a "primary reason" causation test like the one in 20 C.F.R. § 410.426(a). *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 286 (6th Cir. 1983).

litigate Part B claims.[17] SSA's choices in this regard were matters between the agency and Congress, but they clearly do not carry the implication that mine owners and the Secretary of Labor were also to take the role of observer in Part C claims litigation.

SSA's Manual is similarly meaningless. First, as noted by the Government, the provisions in the Manual may suggest that SSA's interim presumptions contained no limitation on rebuttal whatever, and that it could operate as a more traditional "bursting bubble" role of proof. *See* Labor's Brief at 22-23. This interpretation is not inconsistent with 20 C.F.R. § 410.490(b)(2), (3), and (c), none of which parts of the SSA rules expressly limit rebuttal inquiries.

The Manual is, in any event, not a reliable or meaningful source of authority for any purpose. If it were inconsistent with the Act, or the published regulations of the agency, it would not control. It is also not generally a public document and there is no indication anywhere that Congress or anyone outside of SSA knew of its contents. The statements in the Manual do not stand alone in guiding agency personnel. They are supplemented by innumerable rulings, bulletins, amendments, interpretative guidelines and common practices by the agency.[18] Whatever SSA, or any agency, does behind closed doors is not a reliable or proper source of authority. *See Bowen v. City of New York*, 476 U.S. 467, 475 (1986). A

[17] Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and their Survivors — Improvements Are Needed* 43-47, 51-52 (1977), *reported in 1977 Senate Hearings, supra*, p. 6 at *316-20, 324-25*.

[18] Counsel for the petitioners in *Clinchfield Coal*, No. 90-113, submitted a request to SSA under the Freedom of Information Act for all general operations documents used by SSA in its administration of the Part B program. Counsel was informed that this body of documents was composed of the Manual and the forty crates of additional documents stored in the agency's archives. The Manual was obtained but the forty crates were left undisturbed.

far better source in the setting presented here is DOL's contemporaneous construction of its responsibilities under 30 U.S.C. § 902(f)(2). DOL is the agency that was directed to write an interim presumption for certain Part C claims and it is DOL's exercise of the granted authority that is now before the Court.

Pauley's theory seeking invalidation of DOL's disability causation rebuttal rule is without substance and should be rejected.

C. THE COURT SHOULD NOT IMPOSE LIABILITY ON THE BLACK LUNG TRUST FUND IN CLAIMS LACKING A CONNECTION BETWEEN A MINER'S DISABILITY AND COAL MINE DUST RELATED DISEASE

After having spent considerable effort to convince the Court that section 402(f)(2) of the Act erects an irrebuttable presumption of disability causation for miners who are able to invoke an interim presumption, Pauley concedes, as he must, that the irrebuttable presumption does not apply in cases involving mine operators because of section 422(c) of the Act. 30 U.S.C. § 932(c). Section 422(c) prohibits the imposition of liability on a mine operator unless the disability or death of a miner arose, at least in part, out of employment in the operator's mines. Pauley argues that where a mine operator may prevail under this provision, the Black Lung Disability Trust Fund must pay the claim.

There is no source of authority to justify an interpretation of Part C to require or permit the application of various eligibility rules depending on whether a mine operator or the Trust Fund will pay the benefits awarded. The Trust Fund is authorized, inter alia, to pay benefits when "there is no operator who is liable for the payment of benefits." 26 U.S.C. § 9501(d)(l)(B).

Neither 26 U.S.C. § 9501(d)(l)(B), nor any other provision of law, acknowledges the possibility that only a financial

solvent or fully insured mine operator may escape liability for the payment of benefits to an otherwise eligible claimant. DOL's regulations define where an operator is liable ("responsible") and when it is not liable. An operator is a "responsible" operator if it employed the miner for at least one year, was a mine operator during the requisite periods, and is financially responsible. 20 C.F.R. §§ 725.492, 725.493. DOL is expressly authorized by the Act to regulate the conditions upon which liability may be imposed upon an operator, 30 U.S.C. § 932(h), and by implication this authority requires the Secretary to regulate concerning when liability falls on the Trust Fund. At no place in DOL's rules or in the Act's legislative history is there a hint that there could ever be a Part C claim in which the eligibility criteria would differ in the same litigation depending on who pays.[19]

The Trust Fund "stands in the shoes of the employer. . . . ", *Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 953 (5th Cir. 1979); *see also Republic Steel Corp. v. Director, Office of Workers' Compensation Programs*, 590 F.2d 77 (3d Cir. 1978); *Director, Office of Workers' Compensation Programs v. South East Coal Co.*, 598 F.2d 1046 (6th Cir. 1979); *Director, Office of Workers' Compensation Programs v. Leckie Smokeless Coal Co.*, 598 F.2d 881 (4th Cir. 1979). The Secretary of Labor, on behalf of the Trust Fund was granted full party status in claims, 30 U.S.C. § 932(k), and all of the defensive rights available to an employer and insurance carrier. 30 U.S.C. § 932(a) ("reference in [the Longshore] Act to the

---

[19] Such a rule, if adopted, would most likely have an unfortunate impact on the Trust Fund. So as not to jeopardize an award it would often make sense for an administrative law judge to find disability causation rebuttal in favor of the operator and then let liability come to rest on the Fund. Since operators will always investigate disability causation with medical evidence, the easy solution for the ALJ and the best approach for the claimant is a Trust Fund award. A smart claimant would not attempt to answer section 727.203(b)(3) rebuttal evidence submitted by an operator.

employer shall be considered to refer to the trustees of the fund, as the Secretary [of Labor] considers appropriate. . . . ") The Longshore Act contains the procedural rights conferred on mine operators and all other parties. *Id.*

Pauley's attempt to extract benefits from the Black Lung Disability Trust Fund is artful but wrong.[20] There is no supporting authority for the result sought in this connection.

---

[20] Also wrong is Pauley's statement:

> At the time *Usery* [*v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)] was decided, unlike now, an operator who successfully avoided liability under Section 422(c) also defeated the claim entirely because the Trust Fund did not yet exist. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978) (creating the Trust Fund).

See Pauley's Brief at 47 n.30. On the contrary, a claimant entitled to benefits for whom, for some reason, there was no responsible operator and prior to the creation of the Fund, section 424 provides ". . . . the Secretary shall pay such miner. . . . " Black Lung Benefits Act of 1972, Title IV; Part C, § 424, 83 Stat. 798, May 19, 1972, Pub. L. No. 92-303, § 1(c)(1), 86 Stat. 151.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in No. 89-1714 should be affirmed. The decisions of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted,

JOHN J. BAGNATO
Counsel of Record
BethEnergy Mines Inc.
SPENCE, CUSTER,
SAYLOR, WOLFE & ROSE
Post Office Box 280
Johnstown,
Pennsylvania 15907
(814) 536-0735

CURTIS H. BARNETTE*
General Counsel
Bethlehem Steel Corp.
Law Department
Bethlehem,
Pennsylvania 18016

ALLEN R. PRUNTY*
JACKSON & KELLY
1600 Laidley Tower
Post Office Box 553
Charleston,
West Virginia 25322

MARK E. SOLOMONS*
LAURA METCOFF KLAUS*
ARTER & HADDEN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

**Of Counsel*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" and "presence of pneumoconiosis" rebuttal tests at 20 C.F.R. § 727.203(b)(3) and (b)(4) violate the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who establish that they meet the invocation requirement of the DOL interim regulation at § 727.203(a)(3) by blood gas study evidence.

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing "disability causation" and "presence of pneumoconiosis" factual inquiries for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	1
A. Statutory And Regulatory Background	1
B. This Litigation	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	Page
Collins v. *Old Ben Coal Co.*, 861 F.2d 481, 483 (7th Cir. 1988) (Easterbrook, J., concurring)	8
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988)	3, 5, 7, 8
Taylor v. *Peabody Coal Company*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed* 58 U.S.L.W. 3724 (U.S. May 2, 1990) (No. 89-1696)	7, 8
CONSTITUTIONAL PROVISION AND STATUTE:	
U.S. CONST. amend. V	i, 1
Black Lung Benefits Act of 1972, Pub. L. 92-303, 86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988)	i, 1, 2
§ 401(a), 30 U.S.C. § 901(a)	1
§ 402(f)(2), 30 U.S.C. § 902(f)(2)	i, 1, 3-10, 12, 13
§ 413(b), 30 U.S.C. § 923(b)	8
§ 422(c), 30 U.S.C. § 932(c)	1
§ 422(j), 30 U.S.C. § 932(j)	1
26 U.S.C. § 9501(d)(1)	1
30 U.S.C. § 902(f) (1970 and Supp. II) (1972)	i, 1
42 U.S.C. § 423(d)(1)(a)	12
REGULATIONS:	
20 C.F.R. Part 404, Subpart P, Appendix 1 § 302 Table III-A	12
20 C.F.R. Part 410, Subpart D	12
§ 410.412	1
§ 410.416	9
§ 410.424(b)	12
§ 410.456	9
§ 410.490	1, 5
§ 410.490(b)(1)(i)	1, 6, 9, 10
§ 410.490(b)(1)(ii)	1, 6, 9, 10
§ 410.490(b)(2)	9
§ 410.490(b)(3)	9
PART 718:	
§ 718.103(a)	11
§ 718.105(a)	11
PART 727:	
§ 727.203	1

Table of Authorities Continued

	Page
§ 727.203(a)(1)	10
§ 727.203(a)(2)	10
§ 727.203(a)(3)	i, 1, 2, 6, 10, 11
§ 727.203(a)(4)	10
§ 727.203(a)(5)	10
§ 727.203(b)	5
§ 727.203(b)(3)	*passim*
§ 727.203(b)(4)	*passim*
§ 727.206(b)(2)(ii)	11
45 Fed. Reg. 13683 (1980)	11
Coal Miner's Benefits Manual (Part IV) TI #21, Supp 2, Exhibit G	11
LEGISLATIVE MATERIALS:	
S. Rep. No. 743, 92d Cong., 2d Sess. (1972)	11
MISCELLANEOUS:	
Briefs and Appendix	
Bethenergy Mines, Inc. v. *Director, O.W.C.P. and Pauley*, 890 F.2d 1295 (3d Cir. 1989), *petition for cert. granted*, 59 U.S.L.W. 3715 (Oct. 29, 1990) (No. 89-1714).	
Brief for Petitioner Harriet Pauley (No. 89-1714) (U.S. Supreme Court)	1
Consolidation Coal Co. v. *Director, O.W.C.P. and Albert C. Dayton*, 895 F.2d 173 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3725 (October 29, 1990) (No. 90-114).	
Brief for Respondent Albert C. Dayton (No. 90-114) (U.S. Supreme Court)	9, 12, 13
Taylor v. *Clinchfield Coal Co. and Director, O.W.C.P.*, 895 F.2d 178 (4th Cir. 1990), *petition for cert. granted*, 59 U.S.L.W. 3725 (Oct. 29, 1990) (No. 90-113).	
Brief for the Director, O.W.C.P.	6
Joint Brief for the Petitioners' ClinchfieldCoal Co. and Consolidation Coal Co.	6
Taylor v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 3725 (U.S. May 2, 1990) (No. 89-1696).	
Appendix at 21, *Peabody Coal Co.* v. *Taylor*, No. 89-1696 (U.S. Supreme Court)	8

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c), (j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727,203, 89-1714 App. 1-13 sets forth each of these provisions.[1]

STATEMENT

A. Statutory And Regulatory Background

In her brief to this Court in No. 89-1714, petitioner Harriet Pauley reviews the statutory and regulatory background relevant to this case, except for the operation of the HEW interim provisions at 20 C.F.R. § 410.490[2] in "ventilatory study" cases like respondent Dayton's case, No. 90-114.[3] However, respondent Dayton does analyze

---

[1] The "89-1714 App." is the Appendix to the Brief for Petitioner Harriet Pauley in No. 89-1714, with which this case and No. 90-114 are consolidated. Citations to "Pet. App." and to "90-114 Pet. App." are to the Appendices to Clinchfield Coal Company's petition for certiorari in this case and to Consolidation Coal Company's petition for certiorari in No. 90-114, respectively.

[2] Like petitioner Pauley, we often refer to 20 C.F.R. § 410.490 as the "HEW interim provision," which is its popular name. Similarly, we often refer to 20 C.F.R. § 727.203 as the "DOL interim regulation." The citations to various provisions of 20 C.F.R. usually omit the "20 C.F.R." citation.

[3] As petitioner Pauley explains in her brief ("89-1714 Pet. Br."), "ventilatory study" cases are cases in which miners invoke the presumption that the HEW interim provision confers by ventilatory study evidence under § 410.490(b)(1)(ii). 89-1714 Pet. Br. at 7 and n.7; *see also* 90-114 Pet. App. at 8-9. In contrast, "blood gas study" cases are ones in which the miners, like respondent Taylor here, invoke the similar presumption under the DOL interim regulation by blood gas study evidence under § 727.203(a)(3). 89-1714 Pet. Br. at 7 and n.7. *See* Pet. App. at 5a, 26a. The third of the consolidated cases before the Court, No. 89-1714, is an "x-ray" case, one in which the miner John Pauley invoked the HEW interim presumption by x-ray evidence under § 410.490(b)(1)(i). 89-1714 Pet. Br. at 7 and n.7.

the operation of the HEW interim provision in ventilatory study cases and, for the reasons discussed in the Argument Section *infra*, that analysis also explains the operation of the HEW interim provision as it is relevant to blood gas study cases like Mr. Taylor's here.

B. This Litigation

Mr. Taylor was employed for almost twelve years in this nation's coal mines as a coal loader and roof bolter. Pet. App. at 23a-24a. Because Mr. Taylor worked for Clinchfield Coal Company as a roof bolter from 1969-72, Pet. App. at 23a, Clinchfield was identified as the responsible operator by the Department of Labor. Pet. App. at 24a.

On November 5, 1976, Mr. Taylor applied for benefits under the Black Lung Benefits Act. Because of the date of application, the claim was evaluated under the Department of Labor interim regulations. Pet. App. at 5a. After benefits were awarded by the Deputy Commissioner of the Department of Labor, Clinchfield contested Mr. Taylor's entitlement. Pet. App. at 5a.

On December 14, 1983, a hearing was held in Abingdon, Virginia before an administrative law judge (ALJ). The ALJ invoked the interim presumption in § 727.203(a)(3) finding that Mr. Taylor had more than ten years of coal mine employment and had presented qualifying arterial blood gas studies. The ALJ then denied the claim because he concluded that the company rebutted the presumption pursuant to §§ 727.203(b)(3) and (b)(4), Pet. App. at 5a, after finding that Mr. Taylor did not have pneumoconiosis and was "not totally disabled from this disease."[4] The

[4] The Court of Appeals, besides concluding that the Secretary improperly applied § 727.203(b)(3) and (b)(4) to this case, also concluded that the ALJ's "conclusion . . . will not support a finding rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law. Pet. App. at 6a. Thus, if the DOL rebuttal test at § 727.203(b)(3) is found to be valid, the ALJ's application of an erroneous § 727.203(b)(3) standard mandates that this case be remanded to the ALJ for application of the proper standard.

Benefits Review Board affirmed the denial on May 14, 1987. Pet. App. at 17a-19a.

Mr. Taylor filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The review was granted and briefs were filed on the merits. While awaiting oral argument before the Fourth Circuit, this Court's decision in *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), invalidated the ten year requirement for invocation of the DOL interim presumption, thereby calling into question the validity of the DOL rebuttal provisions at issue here. The claimant requested and was granted permission to file a supplemental brief addressing the validity of the two additional rebuttal methods in the DOL regulation. On February 5, 1990, the court of appeals issued its decision remanding this case. Pet. App. at 4a-16a. The court held that the two additional rebuttal tests in the DOL regulation at § 727.203(b)(3) and (b)(4) were invalid because they are criteria that impose requirements that are more restrictive than those applicable to a claim filed on June 30, 1973. Clinchfield and the Director filed motions for rehearing that were denied on April 20, 1990. On July 17, 1990 Clinchfield filed a petition for writ of certiorari. This court granted the petition on October 29, 1990 and consolidated this case with Nos. 89-1714 and 90-114.

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Taylor's

using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires affirmance of the court of appeals' judgment.

Mr. Taylor invoked the DOL interim presumption by showing that he had more than ten years of coal mine employment and presenting qualifying arterial blood gas studies, a form of evidence which would not have invoked the HEW interim provision. The Director and the coal companies incorrectly argue that this distinction allows the Secretary to impose additional rebuttal tests on Mr. Taylor.

The "criteria" encompassed by Section 402(f)(2) are the substantive standards governing eligibility for benefits, not the forms of evidence used to meet those standards. Both blood gas studies and ventilatory studies address the same "criteria"; therefore, the Secretary of Labor's attempt to make rebuttal in a blood gas study case more restrictive than rebuttal in a ventilatory study case under the HEW interim provision violates Section 402(f)(2).

The "criteria" that a claimant must prove in order to invoke the HEW interim provision are the "existence of pneumoconiosis" criterion, which a claimant can prove by X-ray, biopsy, or autopsy, and the "presence of a chronic respiratory or pulmonary disease" criterion, which a claimant can prove by ventilatory study evidence. Blood gas study evidence also shows the "presence of a chronic respiratory or pulmonary disease."

In fact, blood gas study evidence has the same degree of reliability for proving the "presence of a chronic respiratory or pulmonary disease" criterion as does ventilatory study evidence. The scarcity of facilities at which blood gas studies could be performed explains the futility of

HEW establishing a blood gas study table for the HEW interim provision.

Since blood gas study evidence is just as reliable for proving the "presence of a chronic respiratory or pulmonary disease" criterion as ventilatory study evidence, the Secretary of Labor may not impose the more restrictive rebuttal tests on claimants, such as Mr. Taylor, who invoke by using blood gas study evidence. The Secretary's attempt to do so violated Section 402(f)(2) by allowing opponents in blood gas study cases to rebut the presumption using factual inquiries that, as respondent Dayton persuasively argues in his brief to this Court in No. 90-114, the HEW interim provision did not include.

Under Section 402(f)(2), blood gas study cases must be treated exactly the same as ventilatory study cases. Based upon this conclusion, we adopt respondent Dayton's arguments—explaining why the rebuttal tests at §§ 727.203(b)(3) and (b)(4) violate Section 402(f)(2) and why the resulting eligibility scheme is constitutional—as our own.

ARGUMENT

Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) teaches that, pursuant to Section 402(f)(2) of the Act, the HEW interim provision at § 410.490 sets forth the *statutory* standard of restrictiveness for the "criteria" the Secretary may apply to claims, including Mr. Taylor's claim here, that are subject to the "not . . . more restrictive" mandate of Section 402(f)(2). *Sebben*, 488 U.S. at 113-116. In this context, the questions presented here are: (1) whether any rebuttal provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2) (*i.e.*, whether any such rebuttal provision is "more restrictive" than the "criteria" set forth in the

HEW interim provision); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *See id.* at 119.

Nos. 89-1174 and 90-114 present these same two questions. However, as we have explained at p. 1 and n.3 *supra*, those cases are an "x-ray case" and a "ventilatory study case," respectively, ones in which the claimant successfully invoked the HEW interim presumption by x-ray evidence under § 410.490(b)(1)(i) and by ventilatory study evidence under § 410.490(b)(1)(ii). In contrast, this case is a "blood gas study case," one in which the claimant did not invoke the HEW interim presumption at all but did invoke the DOL interim regulation by blood gas study evidence under § 727.203(a)(3), Pet. App. at 5a, 26a, a form of evidence that did not allow invocation of the HEW interim provision.

The Director and the coal companies in this case and in No. 90-114 contend that this distinction is determinative. Because the HEW interim provision cannot be invoked by blood gas study evidence, they argue, the DOL interim regulation cannot be more restrictive than the HEW interim provision in blood gas study cases, and so cannot violate Section 402(f)(2) of the Act in such cases, even though the DOL interim regulation allows the opponents of such claims to defeat the claims by rebutting them using rebuttal tests that the HEW interim provision did not provide. Brief for the Director, O.W.C.P. at n.15; Joint Brief for the Petitioners Clinchfield Coal Company and Consolidation Coal Company at 32-34.

The Director and the coal companies are wrong because they assume that forms of evidence such as x-rays, ventilatory studies, and blood gas studies are "criteria"

within the meaning of, and that set the statutory standard of restrictiveness under, Section 402(f)(2). This assumption is incorrect. The "criteria" that Section 402(f)(2) encompasses are, as we explain *infra*, substantive standards governing eligibility for benefits, not the forms of evidence utilized to meet those standards. Moreover, because the particular "criteria" that pertain to invocation of the DOL interim presumption in blood gas study cases are the identical "criteria" that pertain to invocation of the HEW interim presumption in ventilatory study cases, Section 402(f)(2)'s "not . . . more restrictive" mandate prohibits the Secretary of Labor from making rebuttal of the presumption in blood gas study cases more restrictive to the claimant than rebuttal is in ventilatory study cases under the HEW interim provision.

Section 402(f)(2)'s mandate prohibits the Secretary from adjudicating the cases subject to the section using "criteria" that are "more restrictive" (*i.e.*, less favorable to claimants) than the "criteria" of the HEW interim provision. *Sebben*, 488 U.S. at 113-16. The term "criteria" in Section 402(f)(2) means "'standard[s] on which a judgment or decision may be based.'" *Id.* at 113 (quoting Webster's Ninth New Collegiate Dictionary 307 (1983)). The "criteria" in Section 402(f)(2) are therefore the *substantive* standards that the miner must meet to establish his eligibility—either "law" standards, "fact" standards, or mixed questions of "law" and "fact" standards. They are not the permissible or mandatory forms of "evidence" that a miner employs to meet the substantive standards. A Seventh Circuit panel captured the proper distinction in denying a coal company's petition for rehearing in *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W.3725 (U.S. May 2, 1990) (No. 89-1696). The company had argued that Section 413(b) of

the Act, which requires consideration of "all relevant evidence" in the adjudication of claims, overrides the directive in Section 402(f)(2) of the Act that the Secretary of Labor not apply to claims subject to that section more restrictive "criteria" than had been applicable to claims under the HEW interim provision. The panel, drawing a distinction between "evidence" and "substantive rules of law," held that the question of whether "evidence' is admissible or must be considered in a black lung claim is distinct from the question of what "substantive . . . law" controls, and that a "standard of admissibility [for evidence] cannot control substantive law." Order denying rehearing in *Peabody Coal Co.* (No. 89-1696) at App. 21 (citing *Collins* v. *Old Ben Coal Co.*, 861 F.2d 481, 483 (7th Cir. 1988) (Easterbrook, J., concurring)).

This understanding of the term "criteria" permits identification of the particular types of "criteria" encompassed within the HEW interim provision—that is, the type of substantive standards that establish the statutory standard of restrictiveness under Section 402(f)(2). *Sebben*, 488 U.S. at 113-116. As relevant here, these criteria are: (1) all facts that are presumed under the HEW interim provision or that must be proven or disproven in order to invoke or rebut the HEW interim presumption; (2) with respect to each such fact, whether it is conclusively presumed and, if not, which party has the burden to prove or disprove it; and (3) with respect to each such fact that must be proven or disproven (though not with respect to facts that are conclusively presumed), the substantive degree of reliability to which the fact is proven or disproven.

Understanding the types of criteria encompassed within the HEW interim provision in turn permits the identification of the possible ways in which the Secretary

of Labor could apply "criteria" that are more or less restrictive than the "criteria" applicable under the HEW interim provision in violation of, or in compliance with, Section 402(f)(2)'s "not . . . more restrictive" mandate. Thus, the Secretary could add or delete a particular "fact" or strengthen or relax a particular law/fact standard to be proven or met by the miner or his opponent (*e.g.*, that the miner have a chronic respiratory or pulmonary disease or that he be able to do his usual coal mine work or its equivalent). Alternatively, the Secretary should change the party who has the burden to prove or disprove a particular fact. Finally, the Secretary could modify the substantive degree of reliability to which a particular fact must be proven or disproven.

The obvious "criteria" that a claimant must prove in order to invoke the HEW interim provision are the "existence of pneumoconiosis" criterion, which claimant can prove by x-ray, biopsy, or autopsy evidence under § 410.490(b)(1)(i),[5] and the "presence of a chronic respiratory or pulmonary disease" criterion, which claimants can prove by ventilatory study evidence under § 410.490(b)(-1)(ii).[6] The DOL interim regulation, besides keeping the

---

[5] Claimants who prove the "existence of pneumoconiosis" under § 410.490(b)(1)(i) invoke the HEW interim presumption if they also prove one of two other "criteria"—that their pneumoconiosis "arose out of coal mine employment," § 410.490(b)(2), or that they worked in the mines at least the ten years necessary to obtain the presumption of causation that § 410.416 or § 410.456 provides. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456).

[6] Claimants who prove the "presence of a chronic respiratory or pulmonary disease" under § 410.490(b)(1)(ii) invoke the HEW interim provision if they also prove the additional "criterion" that they worked in the mines at least ten years necessary to obtain the presumption of causation that § 410.490(b)(3) provides. *See* Brief for Respondent Albert C. Dayton in No. 90-114 at 18-19.

forms of evidence that the HEW interim provision allowed claimants to use to prove these two "criteria," *compare* §§ 727.203(a)(1) *and* (a)(2) *with* §§ 410.490(b)(-1)(i) *and* (b)(1)(ii), added three forms of evidence that claimants can use to prove the "presence of a chronic respiratory or pulmonary disease" criterion: blood gas studies (§ 727.203(a)(3)), physicians' reports (§ 727.203(a)(4)), and lay evidence (§ 727.203(a)(5)).

Two of these three additional forms of evidence—physicians' reports and lay evidence—are less reliable forms of evidence than the ventilatory study evidence that the HEW interim provision allowed claimants to use to prove the "presence of a chronic respiratory or pulmonary disease" criterion. Insofar as the addition of physicians' reports and lay evidence enlarged the range of reliability that was acceptable under the HEW interim provision in proving that fact, the Secretary made the degree of reliability that the DOL interim regulation requires in proving the fact *less restrictive* than the degree of reliability that the HEW interim provision required in proving the same fact. The Secretary was therefore free to attach any conditions to the use of physicians' reports and lay evidence to invoke the presumption without violating Section 402(f)(2) of the Act. And she did so in several ways: (a) by limiting invocation of the presumption using either physicians' reports or lay evidence to claims in which the claimants' chronic respiratory or pulmonary disease is severe enough that it is "totally disabling," §§ 727.203(a)(4), (a)(5); (b) by further limiting invocation of the presumption using lay evidence to claims in which the miners are deceased and "no medical evidence is available," § 727.203(a)(5); and (c) by allowing opponents to rebut the presumption by using the rebuttal tests at

§§ 727.203(b)(3) and (b)(4), rebuttal tests that the HEW interim provision did not allow opponents to use.

Unlike physicians' reports and lay evidence, blood gas studies, which § 727.203(a)(3) allows miners to use to invoke the presumption, are *not* a less reliable form of evidence for proving the "presence of a chronic respiratory or pulmonary disease" criterion than ventilatory studies, the form of evidence that the HEW interim provision allowed claimants to use to prove that fact. Indeed, consistent with the position of many commentators, the Secretary of Labor considers blood gas studies "the most useful measurement of the heart-lung system." 45 Fed. Reg. 13683 (1980). Like ventilatory studies, blood gas studies provide an objective measure of the extent of any existing respiratory or pulmonary impairment—blood gas studies, by measuring any impairment in the diffusion component of the respiratory system, §§ 718.105(a), 727.206(b)(2)(ii); and ventilatory studies, by measuring any impairment in the ventilation component of the respiratory system. §§ 718.103(a), 727.206(b)(2)(ii). Because blood gas studies require expensive and sophisticated equipment that was extremely scarce in the coal fields, S. Rep. No. 743, 92d Cong., 2d Sess. 18019 (1972),[7] it would have been futile for HEW to have expended the time and resources necessary to develop a blood gas study table suitable for inclusion in the HEW interim provision. Thus, HEW did not include blood gas studies as a form of evidence available under the HEW interim provision for

[7] Indeed, *no* such facilities existed in the coal fields of Virginia where Mr. Taylor lived. Coal Miner's Benefits Manual (Part IV), TI#21, Supp. 2, Exhibit G.

proving "the presence of a chronic respiratory or pulmonary disease."[8]

Because blood gas studies did not lower the degree of reliability that ventilatory studies set in proving that fact under the HEW interim provision, the inclusion of blood gas studies did not make the substantive degree of reliability that the DOL interim regulation requires in proving that fact less restrictive than the substantive degree of reliability that the HEW interim presumption required in proving the same fact. Consequently, Section 402(f)(2)'s "not . . . more restrictive" mandate prohibited the Secretary of Labor from attaching any conditions to the use of blood gas studies to invoke the presumption other than the conditions that the HEW interim provision had attached to the use of ventilatory studies to invoke its presumption. The Secretary therefore violated Section 402(f)(2) by allowing opponents to rebut the presumption in blood gas study cases by using the rebuttal tests at §§ 727.203(b)(3) and (b)(4), rebuttal tests setting forth factual inquiries that, as respondent Dayton argues persuasively in his brief to this Court in No. 90-114, the HEW interim provision did not include.

In sum, that miners in blood gas cases invoke a presumption of eligibility for benefits by a "form of evidence"

[8] A blood gas study table does appear in HEW's permanent regulations. Appendix to 20 C.F.R. Part 410, Subpart D (referenced in § 410.424(b)). However, the strict values necessary to satisfy that table simply reiterate the values in the table used to determine "total disability" under the much stricter definition of that term that the Social Security Administration used in adjudicating claims for Social Security disability benefits. 42 U.S.C. § 423(d)(1)(A) defining "total disability" as the "inability to engage in any substantial gainful activity"); 20 C.F.R. Part 404; Subpart P, Appendix 1, § 302, Table III-A. HEW never developed any blood gas study table applicable only to black lung claims.

not available under the HEW interim provision is statutorily irrelevant to whether the Secretary applies to the claims of such miners "criteria" that are more restrictive than are applicable under the HEW interim provision in violation of Section 402(f)(2). Accordingly, under Section 402(f)(2), blood gas study cases, in which the claimants seek to prove the substantive fact that they have a "chronic respiratory or pulmonary disease," must be treated exactly the same as are ventilatory study cases, in which the claimants seek to prove the identical substantive fact. This conclusion permits us to adopt respondent Dayton's arguments—explaining why the rebuttal tests at §§ 727.203(b)(3) and (b)(4) violate Section 402(f)(2) in ventilatory study cases and why the resulting eligibility scheme for black lung benefits is constitutional—as our own. *See* Brief for Respondent Albert C. Dayton in No. 90-114 at Argument §§ I and II.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

SHERRY LEE WILSON,
Client Centered Legal Services of Southwest Virginia, Inc.
P.O. Box 147
Castlewood, Virginia 24224
(703) 762-5501

Attorney for Respondent
John A. Taylor (No. 90-113)

(12) (10) (10)

Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

REPLY BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

TIMOTHY P. CREANY
BLAIR V. PAWLOWSKI
(Counsel of Record)
603 N. Julian Street
P.O. Box 658
Ebensburg, PA 15931
(814) 472-7046

JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
343 S. Dearborn Street, Suite 700
Chicago, IL 60604
(312) 341-1070

Attorneys for Petitioner Harriet Pauley (No. 89-1714)

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
ARGUMENT	1
SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION ..	1
A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision ..	1
1. The Text Of The HEW Interim Provision Does Not Contain A "Disability Causation" Factual Inquiry	1
2. HEW's Contemporaneous Interpretation Of Its Interim Provision	5
3. Judicial Interpretations Of The HEW Interim Provision	6
4. The Circumstances Attending Adoption Of The HEW Interim Provision	7
B. The Disability Causation Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act	11
C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference	17

PAGE

D. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: PAGE(S)

Aluminum Co. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380 (1984) 17

Bowen v. Yuckert, 482 U.S. 137 (1987) 10

Burlington No. R. Co. v. Okla. Tax Comm'n, 481 U.S. 454 (1987) 12

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 12

Demarest v. Manspeaker, 59 U.S.L.W. 4047 (U.S. January 8, 1991) 12

Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975) 2

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 16

Haywood v. Secretary of Health & Human Services, 699 F.2d 277 (6th Cir. 1983) 6-7

Miller v. Youakim, 440 U.S. 125 (1979) 18

Mourning v. Family Publications Service, 411 U.S. 356 (1973) 10

Mullins Coal Co. v. Director, O.W.C.P., 484 U.S. 135 (1987) 7, 13

New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 18

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 4, 12-13, 14

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) .. 10

Silas Mason Co. v. Tax Comm. of Washington, 302 U.S. 186 (1937) 11

PAGE(S)

United States v. James, 478 U.S. 597 (1986) 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 4, 14-15, 18

STATUTES:

Black Lung Benefits Act of 1972, Pub. L. 92-303, (86 Stat. 150 (1972), 30 U.S.C. §§ 901 *et seq.* (1988):

§ 401(a), 30 U.S.C. § 901(a) 19
§ 402(f)(1)(A), 30 U.S.C. §902(f)(1)(A) 19
§ 402(f)(1)(B), 30 U.S.C. § 902(f)(1)(B) 10
§ 402(f)(2), 30 U.S.C. § 902(f)(2) ..... *passim*
§ 411(a), 30 U.S.C. § 921(a) 19
§ 411(b), 30 U.S.C. § 921(b) 19
§ 411(c)(1), 30 U.S.C. § 921(c)(1) 15
§ 411(c)(3), 30 U.S.C. § 921(c)(3) 14-15
§ 411(c)(4), 30 U.S.C. § 921(c)(4) 6-7
§ 422(a), 30 U.S.C. § 932(a) 20
§ 422(c), 30 U.S.C. § 932(c) 18-19
§ 422(k), 30 U.S.C. § 932(k) 20

Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(c), 92 Stat. 95 (1978) 10

5 U.S.C. § 552(a)(2)(B), (C) (1988) 18

26 U.S.C. § 9501(a)(2) (1988) 20

30 U.S.C. § 902(f) (1970) 11
30 U.S.C. § 902(f)(1) (1976 & Supp. II 1978) 19
30 U.S.C. § 921(b) (1970) 11
30 U.S.C. § 932(h) (1976) 19
30 U.S.C. § 934 (1970) 18

PAGE(S)

REGULATIONS:

20 C.F.R.:

Part 410:

§ 410.412 15
§ 410.412(a)(1) 1, 2
§ 410.416 15
§ 410.418 15
§ 410.422 15
§§ 410.424-410.426 ..... 2, 15
§ 410.456 15
§ 410.490 ..... *passim*
§ 410.490(b) 2, 14
§ 410.490(b)(1) 3
§ 410.490(b)(1)(i) 3, 6
§ 410.490(b)(1)(ii) 3
§ 410.490(b)(2) 1, 2-4
§ 410.490(c) 2, 6
§ 410.490(c)(1) 1, 5-6
§ 410.490(c)(2) 1, 2, 5-6

Part 727:

§ 727.203(b)(3) 1, 2-4, 6, 9, 11
§ 727.203(b)(4) 4

43 Fed. Reg. 17766 (1978) 5
43 Fed. Reg. 36826 (1978) 5, 6

Coal Miner's Benefits Manual (Part IV) 5, 6, 17-18

§ IB6(e)(3) 6

LEGISLATIVE MATERIALS:

H.R. 4544, 95th Cong., 1st Sess. (1977) 16

H.R. Rep. No. 563, 91st Cong., 1st Sess. (1969) 4

PAGE(S)

S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 8

Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 4, 16

MISCELLANEOUS:

Comptroller General's Report—

General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows (1972) 8-9

Other—

Holmes, O.W., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899) 12

Pemberton, J., *Chronic Bronchitis, Emphysema and Bronchial Spasms in Bituminous Coal Workers*, 13 Arch. Ind. Health 529 (1956) . 4

Prunty, A. and Solomons, M., *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665 (1989) 5

Solomons, M., *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981) 5

Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

REPLY BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

ARGUMENT

SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION.

A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision.

Respondent Dayton in No. 90-114 has reviewed fully what he accurately describes as the "varying and inconsistent" interpretations of the HEW interim provision that the Director, on the one hand, and the coal companies in Nos. 90-113 and 90-114, on the other, have advanced. Dayton Resp. Br. at 11-14; *see also* Joint Brief For Petitioners Clinchfield Coal Company and Consolidation Coal Company ("Coal Co. Br.") at 26-29 (criticizing, on two independent bases, any approach—like the Director's—that reads § 410.490(b)(2) to authorize a "disability causation" factual inquiry). Illogically, the coal company respondent here, Bethenergy Coal Company ("Bethenergy"), "adopt[s]" the Director's position *and* the conflicting position of its fellow coal companies. Bethen. Resp. Br. at 12, 13. Both positions are wrong.

1. The Text Of The HEW Interim Provision Does Not Contain A "Disability Causation" Factual Inquiry.

a. The Coal Companies' Position. In our opening brief we explained that the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) do not implicitly incorporate a "disability causation" rebuttal test like that at § 727.203(b)(3). Opening Br. at 23-26. That explanation, which we originally offered as a refutation of the contrary holding of the court below, *id.*, also became a refutation of the position of the coal companies in Nos. 90-113 and 90-114 when they adopted that holding in their brief. Coal Co. Br. at 28-31.

Except to mischaracterize our reading of the regulatory texts,[1] Bethenergy and its fellow coal companies do not even address our refutation of the Third Circuit's holding and thus of their own position. And because the Director has abandoned the § 410.490(c) parenthetical incorporation theory entirely, *see* Dayton Resp. Br. at 14-15, our explanation has been left unchallenged.[2]

b. The Director's Position. Having abandoned the position he took below, the Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes a "disability causation" factual inquiry like § 727.203(b)(3) both in x-ray cases like this one and in

[1] According to Bethenergy, we argue that § 410.490(c)(2)'s parenthetical citation to § 410.412(a)(1), which in turn parenthetically cites §§ 410.424-410.426, selectively "incorporate[s]" only those portions of §§ 410.424-410.426 "that refer to 'comparable and gainful work.'" Bethen. Resp. Br. at 17 n.14. We made no such argument. Indeed, our position required us to make no explicit argument whatever respecting the parenthetical citation in § 410.412(a)(1) to §§ 410.424-410.426. *See* Opening Br. at 23-26.

[2] Significantly, however, the coal companies in Nos. 30-113 and 90-114 expressly acknowledge that the HEW interim provision does *not* include a "*death* causation" rebuttal test, Coal Co. Br. at n. 38, even though meeting the HEW interim provision's invocation requirements confers presumptions not only of "total disa[bility] due to pneumoconiosis" but also of "*death* . . . due to pneumoconiosis." § 410.490(b) (emphasis added). That the HEW interim provision would lack a "death causation" rebuttal test while nevertheless containing a "disability causation" rebuttal test is counter-intuitive. The natural reading of the HEW interim provision is that it contains neither test.

The coal companies cite *Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975), in which the court held that the HEW interim provision's "disability *severity*" tests at § 410.490(c) could be used to defeat the presumption that the miner died from pneumoconiosis, apparently on the dubious theory that if the miner's impairments were not totally disabling from any cause at the time of his death, he could not have died from pneumoconiosis. Whether or not the court's theory is correct, however, *Farmer* does not even suggest that the HEW interim provision contains any "death causation" rebuttal test that could defeat a claim where the miner's impairments *were* totally disabling at the time of his death.

ventilatory study cases like No. 90-114. Brief for the Director, O.W.C.P. ("Dir. Br.") at 21-24. Section 410.490(b)(2), he says, "is comparable to DOL's third rebuttal method [§ 727.203(b)(3)], since subsection (b)(2) [§ 410.490(b)(2)] speaks of an *impairment* that 'arose out of coal mine employment' while DOL's third rebuttal provision authorizes the coal mine operator to show that the miner's *disability* 'did not arise in whole or in part out of coal mine employment.'" *Id.* at 21-22 (emphasis added). The Director's position thus depends, *inter alia*, on whether the word "impairment" as used in § 410.490(b)(2), which denotes an affliction of some sort, necessarily connotes functional restriction or impediment as well. If the word necessarily has that functional connotation, then it would have a meaning similar to the word "disability" in § 727.203(b)(3).

Significantly, if the Director's position were correct and claimants who satisfy § 410.490(b)(2) thereby prove "disability causation," then Mrs. Pauley has proven "disability causation." For the ALJ concluded that Mr. Pauley's pneumoconiosis arose out of coal mine employment, App. 39 (also stating that Bethenergy had conceded that factual issue), thereby meeting the § 410.490(b)(2) requirement.

The Director's position is wrong, however. Section 410.490(b)(2) expressly states that the particular "impairment" to which it refers is "[t]he impairment established in accordance with paragraph (b)(1) of this section [§ 410.490(b)(1)]." § 410.490(b)(2). Section 410.490(b)(1), in turn, sets forth two distinct classes of impairment--"the existence of pneumoconiosis" as "establish[ed]" by x-ray, biopsy, or autopsy evidence, § 410.490(b)(1)(i), and "the presence of a chronic respiratory or pulmonary disease" as "establish[ed]" by ventilatory study evidence. § 410.490(b)(1)(ii). Based on Mr. Pauley's x-ray evidence, App. 26-27, Bethenergy conceded, and the ALJ found, that the "impairment" that invoked the HEW interim provision in his claim was "the *existence* of pneumoconiosis," App. 39 (emphasis added), an "impairment" that, in any particular claim, may be, but

is *not* necessarily, associated with any functional restriction or limitation. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 194 (1977) [hereinafter *1977 Senate Hearings*] (statement of Herbert Blumenfeld, M.D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA); H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969) (testimony, cited in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976), presented on behalf of the Surgeon General, stating that physicians do not know whether simple pneumoconiosis, as shown by x-rays, necessarily does or does not produce significant respiratory impairment in a miner); Pemberton, J., *Chronic Bronchitis, Emphysema and Bronchial Spasms in Bituminous Coal Workers*, 13 Arch. Ind. Health 529, 541 (1956) (finding "lack of relationship between respiratory disability and radiologic pneumoconiosis" and citing other studies to same effect); *id.* at 538-42; *see also* Opening Br. at 4 n.5. Consequently, with respect to x-ray cases like Mrs. Pauley's, the Director is wrong in contending that the word "impairment" in § 410.490(b)(2) has the same or similar meaning as the word "disability" in § 727.203(b)(3).[3] The Director's position that § 410.490(b)(2) authorizes a "disability causation" factual inquiry in Mrs. Pauley's case is therefore incorrect.[4]

[3] While "impairment" in § 410.490(b)(2) may have a meaning similar to "disability" in § 727.203(b)(3) in ventilatory study cases, the Director also wrongly contends that § 410.490(b)(2) authorizes a "disability causation" factual inquiry in ventilatory study cases. *See* Dayton Resp. Br. at 18-21.

[4] Contrary to one of Bethenergy's assertions, Bethen. Resp. Br. at 5 n.5, we agree with our fellow claimants in Nos. 90-113 and 90-114 that the presence of pneumoconiosis rebuttal test at § 727.203(b)(4), which is not at issue in Mrs. Pauley's case, is also invalid. Bethenergy's erroneous assertion that we "conce[ded]" the issue in our opening brief is based on confused readings of the HEW interim provision, of *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988),

(Footnote continued on following page)

2. HEW's Contemporaneous Interpretation Of Its Interim Provision.

The coal companies in Nos. 90-113 and 90-114 say nothing that even arguably contradicts our showing that HEW's Coal Miners' Benefits Manual strongly supports our reading of the HEW interim provision. Indeed, they do not even mention the Manual in their brief. In contrast, the Director affirmatively relies on the Manual, contending that two of its provisions support his reading of the HEW interim provision. Dir. Br. at 22 n.16 & 23 n.18. Bethenergy now adopts the Director's contentions, Bethen. Resp. Br. at 19,[5] both of which, as respondent

[4] *continued*
and of our opening brief. For example, Bethenergy contends that our supposed "concession" rests on the "unstated premise" that claimants in all cases must prove the existence of pneumoconiosis. Bethen. Resp. Br. at 5 n.5. We neither said nor implied anything of the kind. Indeed, we agree with the contrary position of Mr. Dayton in No. 90-114 that the presence of pneumoconiosis is never proven, but is always conclusively presumed, in ventilatory study cases. Dayton Resp. Br. at 11, 28-29.

[5] We answer Bethenergy's further contention that the Manual is not "reliable or meaningful" at pp. 17-18 *infra*.

Mark E. Solomons, who is both the counsel of record for Clinchfield Coal Company in No. 90-113 and "of counsel" for Bethenergy, was the "principal author" of the DOL interim regulation when he was an official of the Department of Labor. 43 Fed. Reg. 17766 (1978). After leaving the Department of Labor, Mr. Solomons wrote an article in which he asserted that §§ 410.490(c)(1) and (c)(2) implicitly incorporate, *inter alia*, a "disability causation" rebuttal test. Solomons, M., *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880 (1981). *But see* Prunty, A. and Solomons, M., *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 679 (1989) (more recently equivocal with respect to the position). This view appears to be the premise on which the Director had concluded that the DOL interim regulation would not be "more restrictive" than the HEW interim provision if it were drafted to include an explicit "disability causation" rebuttal test. *See* 43 Fed. Reg. 36826 (1978). It also appears, however, that Mr. Solomons, and thus the Director, were unaware of HEW's Manual when the

(Footnote continued on following page)

Dayton has explained, are in error. Dayton's Resp. Br. at 24-25.[6]

3. Judicial Interpretations Of The HEW Interim Provision.

The coal companies do not, as they cannot, quarrel with our observation that the hundreds of thousands of § 410.490 cases have not produced even one administrative or judicial decision construing the HEW interim provision to permit a "disability causation" factual inquiry.[7] But they seek

[5] *continued*
DOL interim regulation was drafted. The Manual is not cited in either of Mr. Solomons' articles or in the responses to comments on the DOL interim regulation as proposed. 43 Fed. Reg. 36826 (1978); *see also* Bethen. Resp. Br. at 19 n.18 (disclosing that Mr. Solomons obtained the Manual in response to a Freedom of Information Act request submitted in connection with No. 90-113). If Mr. Solomons and, through him, the Director had been aware of the Manual, which strongly refutes the view that §§ 410.490(c)(1) and (c)(2) implicitly incorporate a "disability causation" rebuttal test, *see* Opening Br. at 26-27, perhaps the DOL interim regulation would not now include the "disability causation" rebuttal test at § 727.203(b)(3) and would comply with Section 402(f)(2) of the Act.

[6] The Director also says that Manual § IB6(e)(3) offers "[s]ome support" for the § 410.490(c) parenthetical incorporation "theory," Dir. Br. at 24 n.19, which he has abandoned but which the court below adopted. App. 17. By its express terms, however, Manual § IB6(e)(3) addresses only the presence of pneumoconiosis and does not pertain to "disability causation" in cases like Mrs. Pauley's in which claimants successfully invoke the HEW interim presumption by proving under § 410.490(b)(1)(i) that they *do* have pneumoconiosis. *See* Opening Br. at 27 n.16.

[7] Bethenergy and the coal companies in Nos. 90-113 and 90-114 nevertheless assert that in *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277 (6th Cir. 1983), HEW "appears" to have "argued" in favor of denying the claim because of the supposed absence of "disability causation." Bethenergy Br. at 18 n.16; Coal Co. Br. at 31 n.37. But the coal companies misrepresent HEW's position in that case. *Haywood* considered the claimant's eligibility not only under the HEW interim provision but also under the entirely separate presumption provision at Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4). Unlike the HEW interim provision, the Section 411(c)(4) presumption provision does have

(Footnote continued on following page)

to explain that fact away by asserting that HEW "made little or no effort to litigate questionable claims and did not assume an adversary's role." Coal Co. Br. at 39; Bethen. Resp. Br. at 18. HEW, however, certainly "assume[d] an adversary's role" in *all* of the hundreds of black lung cases involving the HEW interim provision that found their way to the federal courts. *See, e.g., Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 154 n.27 (1987) (citing 24 such cases); Coal Co. Br. at 17 n.23 & 21 n.28 (citing cases).

4. The Circumstances Attending Adoption Of The HEW Interim Provision.

Bethenergy asserts that one premise on which our entire case depends is the view that because "some unnamed person at SSA" considered it "virtually impossible" to prove or disprove "disability causation," Bethen. Resp. Br. at 18, Congress, or at least the Senate Committee on Labor and Public Welfare, "expected [in 1972] that SSA would eliminate disability causation as a fact element under" the interim criteria that HEW was to promulgate. *Id.* at 14. But we make no such contention. Rather, our position is that HEW's decision in 1972 to have its interim provision conclusively presume "disability causation," besides furthering the Senate Committee's express wishes that HEW's interim criteria be designed to "permit prompt and vigorous processing of the large backlog of claims,"

[7] *continued*
a "disability causation" rebuttal test. HEW therefore argued that the claimant was not eligible under the Section 411(c)(4) provision because in its view the facts established that "disability causation" was absent. With respect to the HEW interim provision, in contrast, HEW contended that the evidence rebutted the presumption only because the claimant lacked the requisite "disability *severity*." *Haywood*, 699 F.2d at 285. That HEW treated the "disability causation" argument selectively, pressing it with respect to the Section 411(c)(4) presumption provision but not with respect to the HEW interim provision, supports our position.

S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972), was a lawful exercise of the broad rulemaking authority Congress had delegated HEW in 1969. Opening Br. at 29-30, 40 n.25.[8] Moreover, according to the Comptroller General's Report, the view that proving "disability causation" is "virtually impossible," far from being the view of a single individual, was the view of "SSA officials" and "SSA medical officers" and was expressed in the "literature on CWP" as well. *1972 Comptroller General's Report*, p. 8 n.8 *supra* at 31, 32.

While acknowledging the difficulty of determining whether coal mine employment is a cause of a miner's disability if he is impaired by a respiratory impairment, Bethenergy also asserts, without offering any support whatever, that "[i]t is not virtually impossible, or even difficult" to determine whether coal mine employment is a cause of a miner's disability if he is impaired by "an auto accident, gun shot wound or clearly non-respiratory disease." Bethen. Resp. Br. at 8. According to HEW's medical officers, however, the medical conditions that are "virtually impossible" to distinguish from pneumoconiosis as causes of miners' disabilities include not only other respiratory conditions but also a host of *non-respiratory* conditions, among which are "[n]eurological conditions, such as *nerve injuries*, meningitis, and muscular dystrophy;" "[m]uscular conditions, such as polio and *loss of muscular*

[8] Nevertheless, even before HEW promulgated its interim provision, the Comptroller General reported to Congress that HEW's "policy" was to award benefits, without making a "disability causation" factual determination, to disabled claimants who had coal workers' pneumoconiosis and one or more other conditions. General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs In Paying Black Lung Benefits To Coal Miners and Their Widows 33 (1972) [hereinafter *1972 Comptroller General's Report*]. Significantly, after the Comptroller General's Report informed Congress of HEW's "disability causation" policy, Congress did not interfere with the policy either before or after HEW promulgated its interim provision.

strength;" and "[d]egenerative diseases, such as multiple sclerosis, *arthritis*, and arteriosclerotic heart disease." *1972 Comptroller General's Report*, p. 8 n.8 *supra* at 32 (emphasis added).[9] Given this imprecision in the state of the medical art, it would have been surprising indeed if HEW *had* included in its interim provision a "disability causation" inquiry, much less one like the only kind the coal companies say HEW could lawfully have included, an inquiry requiring physicians to opine and adjudicators to decide not merely whether pneumoconiosis was *among* the causes of a miner's disability but, far more precisely than the state of the medical art allowed or yet allows, whether it was the "*primary*" cause of such disability. Coal Co. Br. at 30.

Bethenergy, however, also contends that "[i]t is far more logical to assume that SSA would . . . merely reliev[e] the claimant of the burden of proving "disability causation," Bethenergy Br. at 18, as the DOL interim rebuttal test at § 727.203(b)(3) later did, rather than create a conclusive presumption of "disability causation" for claimants who prove other significant facts. Bethenergy's contention implicitly assumes that HEW would give credence to physicians' opinions regarding whether coal mine employment caused particular miners' disabilities. Actually, however, "it is far more logical to assume" that HEW, having concluded that it was "virtually impossible" to determine the presence or absence of "disability causa-

[9] Based on the medical evidence of record in this case, the administrative law judge found that Mr. Pauley had "several medical problems, including severe arthritis, residual hemiparesis as the result of a stroke, and pulmonary disease," App. 36, and attributed Mr. Pauley's disability to his "arthritis and residual hemiparesis." *Id.* at 39. Mr. Pauley's pulmonary and arthritic conditions are both conditions HEW's medical officers considered "virtually impossible" to distinguish from pneumoconiosis as the cause of a miner's disability; and residual hemiparesis—paralysis on one side of the body—could be as well since it is either a neurological or muscular condition or both.

tion" accurately, would have considered any opinions regarding "disability causation" that physicians nevertheless ventured in the claims of particular miners to be of doubtful reliability at best. Moreover, seeking and evaluating such opinions would have significantly delayed the processing of claims, thereby preventing, or at least greatly interfering with, HEW's ability to reduce the large backlog of unadjudicated claims, which the Senate Committee wanted the HEW interim criteria to do. *See* Opening Br. at 29-30.

In his opening brief, the Director based his reading of § 410.490 in part on the ground that this Court presumes that federal agencies act lawfully, while our interpretation, he contended, requires the conclusion that HEW, in promulgating and applying § 410.490, violated the Act. Dir. Br. at 24-25. We anticipated and refuted that argument in our opening brief. Opening Br. at 40 n.25. Supplementing that refutation are the decisions of this Court that uphold, as proper exercises of agency rulemaking power, federal program regulations that, like the HEW interim provision, preclude "individualized findings of fact" respecting one or more elements of a claim for benefits or program coverage, *Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981), in order that the program be administered efficiently or effectively. *E.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 150-53 (1987); *Gray Panthers*, 453 U.S. at 43-50; *Mourning v. Family Publications Service*, 411 U.S. 356, 369-75 (1973); *see also* Opening Br. at 38-43.[10]

[10] Also supplementing our refutation of the Director's contention is Section 402(f)(1)(B), 30 U.S.C. § 902(f)(1)(B), which Congress enacted together with Section 402(f)(2) as part of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(c), 92 Stat. 95 (1978). The text of Section 402(f)(1)(B) demonstrates that when Congress wished to limit agency rulemaking authority to define "total disability" by disallowing "conclusive" presumptions of fact, it did so expressly. No such limitation attached to Congress' delegation of rulemaking authority to HEW in 1972, when the HEW interim

(Footnote continued on following page)

B. The Disability Causation Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act.

1. In his opening brief, the Director, emphasizing that Section 402(f)(2) refers to "criteria *applicable* to a claim filed on June 30, 1973," framed the statutory question here as "what criteria Congress *understood* to apply to Part B claims, not what criteria HEW *actually applied*." Dir. Br. at 25 (emphasis added). Respondent Dayton has read the Director's contention to be simply that no weight should be given to how HEW actually "implemented" or "put into effect" its interim provision if such implementation differed from the terms of the provision themselves. Dayton Resp. Br. at 32. We believe that reading is a reasonable one and that respondent Dayton's response to it, *id.*, is correct. It is possible, however, to read the Director's contention as advancing the much more ambitious position that no weight need be given even to the terms of the HEW interim provision themselves. For if Congress' *understanding* of the criteria applicable to Part B claims were somehow decisive, and if Congress *understood* the HEW interim provision not to include a "disability causation" factual inquiry, then that *understanding* would control regardless of the actual terms of the provision.

If the Director's argument is as broad as we suggest it might be, then it is one that is both inconsistent with well-established principles of statutory construction and wrong on its own terms.

[10] *continued*
provision was promulgated. 30 U.S.C. § 902(f) (1970); 30 U.S.C. § 921(b) (1970).

Even if the HEW interim provision had transgressed the bounds of the exceptionally broad rulemaking authority HEW enjoyed when it promulgated that regulation, Congress later cured the defect, when, as we explain more fully at p. 13 *infra*, it elevated the HEW interim provision to statutory status in Section 402(f)(2). *See, e.g., Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 208 (1937).

a. This Court "sit[s] . . . to apply what Congress enacted. . . ." *Sebben*, 488 U.S. at 118. Accordingly, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 (1986), *quoting Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, when "the terms of a statute [are] unambiguous," only "rare and exceptional circumstances" will justify overriding the "application of the statute as written." *Demarest v. Manspeaker*, 59 U.S.L.W. 4047, 4049 (U.S. January 8, 1991). These principles define a crucial interpretive distinction between, on the one hand, what the language of the statute means and, on the other, what the legislature means or, as the Director puts it, "understands." What the language of the statute means is ordinarily "conclusive." *Consumer Products Safety Comm'n*, 447 U.S. at 108. In contrast, what the legislature means is never conclusive, is almost always "irrelevant" if the statutory language is unambiguous, *Burlington No. R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987), and comes into play only when it is "clearly expressed" and contrary to the "language of the statute itself." *James*, 478 U.S. at 606; *see also* Holmes, O. W., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) (Justice Holmes, before his appointment to this Court, stating, "[w]e do not inquire what the legislature meant; we ask only what the statute means").

The controlling statutory question here is therefore not "what criteria Congress *understood* to apply to Part B claims," as the Director says, Dir. Br. at 25 (emphasis added), but what Section 402(f)(2)'s phrase "criteria applicable to a claim filed on June 30, 1973" means. *Sebben* itself makes the point. There the Court sought to discern "the meaning" of "the statute," *Sebben*, 488 U.S. at 113, identifying what the "criteria applicable to a claim filed on June 30, 1973" actually were, not what Congress supposedly "understood" those criteria to have been. *Id.* at 113-18. Moreover, *Sebben* held that the language in Section 402(f)(2) referring to the "criteria applicable to a claim filed on June 30, 1973" encompassed, among other Part B eligibility criteria, the actual "standards . . . of the interim HEW regulation." *Id.* at 113-14; *see also id.* at 109 (citing the regulatory terms themselves). We are therefore correct in maintaining, and the Secretary is wrong if he disputes, that "Congress elevated the [terms of the] HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the statutory standard of restrictiveness for the 'criteria' the Secretary of Labor could apply." Opening Br. at 39 (emphasis omitted).

Ironically, the sources that the Director must explore in order to show that Congress "clearly expressed" an "understanding" contrary to the statutory language in Section 402(f)(2) further support our position, not his. The legislative history of the 1978 amendments establishes that Congress was concerned that HEW, in adjudicating cases under the HEW interim provision, did not always consider the medical evidence pertinent to the express rebuttal criteria. *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 149-50 (1987). Section 402(f)(2) therefore provided that the "criteria *applicable* to a claim filed on June 30, 1973," rather than the criteria "*applied*" on that date, define the statutory standard of restrictiveness under that provision because Congress was dissatisfied with HEW's "actual application" of the HEW interim provision, not with the terms of the HEW interim provision themselves. In short, the word "applicable" did not authorize DOL to modify, or apply provisions other than, the terms of the HEW interim provision themselves.

b. Even on its own terms—*i.e.*, looking to what Congress "understood" Section 402(f)(2) to mean rather than to what the language of the Section actually means—the

Director's position is incorrect, as respondent Dayton explains. Dayton Resp. Br. at 31-37. We adopt his argument and make two supplemental points here.

First, the Director's contention that Congress could not have "understood" the "criteria applicable to a claim filed on June 30, 1973" to authorize benefits absent a "disability causation" factual inquiry is properly understood as a variant of his contention in *Sebben* that a particular criterion should be excluded from the ambit of the term "criteria" in Section 402(f)(2). *See Sebben*, 488 U.S. at 114-15. The Director's position is therefore contradicted by the showing in our opening brief at pages 30-31 that the term "criteria" in Section 402(f)(2) is best read as referring to *all* criteria of the HEW interim provision, not merely to "total disability" criteria, much less to "disability severity" criteria, a subset of "total disability" criteria. That showing is buttressed by the fact that invoking the HEW interim provision confers presumptions not only of "total[ ] disab[ility] due to pneumoconiosis," but also of "*death* . . . due to pneumoconiosis." § 410.490(b) (emphasis added). Section 402(f)(2)'s phrase "criteria applicable to a claim filed on June 30, 1973" therefore necessarily refers to "criteria" pertaining to "death" as well as "criteria" pertaining to "total disability." Accordingly, the suggestion that Congress "understood" the word "criteria" in Section 402(f)(2) to be limited to a subset of "total disability" that excludes the "disability causation" criterion, is implausible.

Second, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court considered Section 411(c)(3) of the Act, which confers the irrebuttable presumption of "total disability" due to complicated pneumoconiosis, and concluded that because Section 411(c)(3) does not address "disease causation," claimants who satisfy it are eligible for benefits only if they also satisfy the "disease causation" requirement of other sections of the Act. 428 U.S. at 22 n.21. The Director characterizes this conclusion as a "gloss on the statute," Dir. Br. at 28, of which Congress must have been "aware" when it enacted Section 402(f)(2), *id.* at 17-18, and urges the Court to apply a similar "gloss on the statute in construing Section 402(f)(2) as well." *Id.* at 28. The Director, however, mischaracterizes the Court's treatment of Section 411(c)(3) in *Turner Elkhorn Mining* as a "gloss on the statute." Section 411(c)(3) does not purport to resolve all elements of a claim by itself any more than its companion provision at Section 411(c)(1), which addresses neither "disability severity" nor "disability causation," purports to do so.[11] Thus, the Court did not place a "gloss" on Section 411(c)(3) any more than it would be placing a "gloss" on Section 411(c)(1) if it concluded, as would be proper, that claimants who satisfy Section 411(c)(1) are eligible for benefits only if they also satisfy the "disability severity" and "disability causation" requirements of other sections of the Act. Unlike Sections 411(c)(1) and (c)(3), however, Section 402(f)(2), which incorporates all Part B criteria, *does* purport to resolve all elements of a claim by itself. The Court's treatment of Section 411(c)(3) in *Turner Elkhorn Mining* therefore offers no support for the Director's position.

2. In our opening brief, we emphasized that Section 402(f)(2) was a compromise measure. Opening Br. at 7-13, 41-43. Although Bethenergy acknowledges that fact, Bethen. Resp. Br. at 8, it quarrels with our characterization of the "compromise" as one between "coal industry" and "coal miner" proposals. *Id.* at 6. However, Bethenergy

[11] HEW's permanent regulations therefore recognize that claimants who successfully invoke the Section 411(c)(3) presumption must still prove "disease causation" in order to establish their eligibility for benefits, § 410.418 (implementing Section 411(c)(3)); §§ 410.416, 410.456 (both requiring proof of "disease causation"), just as claimants who successfully invoke the Section 411(c)(1) presumption must still prove both "disability severity" and "disability causation" in order to establish their eligibility. §§ 410.416, 410.456 (both implementing Section 411(c)(1)); §§ 410.412, 410.422-410.426 (all requiring proof of "disability severity" or both "disability severity" and "disability causation").

says nothing that counters the account set forth in our opening brief at pages 8-12, showing our characterization to be accurate.[12]

3. Describing our position as predicated in part upon the contention that the "1977 Congress" was "aware" that there was no "disability causation" factual test in the HEW interim provision, Bethenergy condemns the contention as "undocumented." Bethen. Resp. Br. at 15. However, because the language of Section 402(f)(2) itself forbids the Secretary of Labor from making "criteria" that are "more restrictive" than those in the HEW interim provision "applicable" to specified claims, *see* p. 13 *supra*, it is irrelevant whether Congress was in fact "aware" that one result of that textual directive would be to require the Secretary of Labor to presume "disability causation" conclusively. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982). Moreover, we have not argued that the Congress that enacted Section 402(f)(2) was *in fact* "aware" that there was no "disability causation" factual test in the HEW interim provision. Opening Br. at 44 n.28. We pointed out, however, that under the decisions of this Court a *judicial presumption* that Congress *was* "aware" that the HEW interim provision did not include a "disability causation" inquiry arose when

[12] Bethenergy says that in 1977, when Congress was considering amendments to the Act, "[n]either the coal industry nor the insurance industry . . . proposed any eligibility amendments to the existing 1972 statute." Bethen. Resp. Br. at 6. But the Black Lung Program under the "1972 statute," so far as it affected the coal and insurance industries (*i.e.*, the Part C black lung program), was one under which DOL approved less than ten percent of filed claims. *See* Opening Br. at 8. It would therefore have been astonishing if the coal or insurance industries had proposed any amendments to the 1972 statute. Short of eliminating the program entirely, it is difficult to see what advantage any amendment would have secured for them. Moreover, they actively opposed Section 7 of H.R. 4544 (1977), the "coal miner's" proposed amendment. *E.g.*, *1977 Senate Hearings*, p. 4 *supra* at 91 (statement of Carl E. Bagge, President, National Coal Association).

Congress enacted Section 402(f)(2). Opening Br. at 27 n.17 & 44 n.28, *citing, inter alia, Aluminum Co. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 392 n.8 (1984) ("improvident" to assume Congress was unaware of contractual terms incorporated by reference into statute).

C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference.

Neither the Director nor any of the coal companies says anything to refute respondent Dayton's argument that the Secretary of Labor's interpretations of the HEW interim provision and Section 402(f)(2) of the Act are not entitled to deference. Dayton Resp. Br. at 38-44; *see also* Opening Br. at 27 n.17. We adopt Mr. Dayton's analysis.

As we explained in our opening brief at pages 26-27, the Secretary of *HEW's* contemporaneous interpretation of his interim provision, which he set forth in Part IV of HEW's Coal Miner's Benefits Manual (the "Manual"), supports our position. Bethenergy's response, that the Manual is "not a reliable or meaningful source of authority for any purpose," Bethen. Resp. Br. at 19, does not wash. While Bethenergy correctly observes that no deference would be owed the Manual if it were inconsistent with published regulations or the Act, *id.*, neither the Director nor any of the coal companies is able to show any such inconsistency. Bethenergy also says that the Manual was not the only evidence of HEW's view and that other "rulings" or "practices" may have evidenced different views than the Manual sets forth. Bethen. Resp. Br. at 19. But Bethenergy cannot advance its cause by rank speculation about supporting authority that even it acknowledges may not exist. Bethenergy further asserts that the Manual was not "generally a public document" and that there is no evidence that "anyone outside of SSA knew of its contents." Bethen. Resp. Br. at 19. But the Manual *is* a "public document," having always "been avail-

able for public inspection and copying" under the Freedom of Information Act. 5 U.S.C. §§ 552(a)(2)(B), (C) (1988). To be sure, the Manual was not published in the Code of Federal Regulations. But the deference accorded an agency interpretation is not determined by whether it is set forth in a published regulation. *See Miller v. Youakim*, 440 U.S. 125, 143-44 (1979) (HEW "Program Instruction"); *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 420 (1973) (HEW's approval of state plans).

D. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision.

In our opening brief we pointed out that the Act and regulations establish an eligibility/liability dichotomy in which the function of Section 422(c) of the Act is to determine whether the benefits to a claimant already found eligible for them under the separate *eligibility* provisions of the Act (*e.g.*, under Section 402(f)(2) and the HEW interim provision) are to be paid by one or more coal mine operators or instead by the Black Lung Disability Trust Fund. Opening Br. at 46.[13] Although Bethenergy claims that it disagrees, Bethen. Resp. Br. at 22, its response is merely that "[t]here is no source of authority to justify an interpretation of Part C to require or permit the application of

[13] In that context, we also pointed out that, at the time *Turner Elkhorn Mining* was decided, operators who successfully avoided liability under Section 422(c) also defeated the claim because the Trust Fund did not then exist. Opening Br. at 47 n.30. Bethenergy says that this contention is wrong, citing 30 U.S.C. § 934 (1970). Bethenergy Resp. Br. at 22 n.20. However, that 30 U.S.C. § 934 (1970) authorized the Secretary of HEW to pay benefits when a responsible operator could not be found or would not pay does not suggest that we erred in maintaining that, in cases in which responsible operators *could* be found and *would* pay, the operators' avoidance of liability under Section 422(c) also defeated the claims prior to the creation of the Trust Fund.

various *eligibility* rules depending on whether a mine operator or the Trust Fund will pay the benefits awarded." Bethen. Resp. Br. at 20 (emphasis added). We agree: our position is precisely that Section 422(c) is not an eligibility provision but only addresses which entity as between one or more coal mine operators or the Trust Fund is *liable* for an eligible claimant's benefits.[14]

Bethenergy speculates that our reading of Section 402(f)(2), joined with our reading of Section 422(c), would encourage administrative law judges to please each claimant by finding him eligible and simultaneously to please each coal mine operator by exonerating it from liability. Bethen. Resp. Br. at 21 n.19. This immensely cynical view of administrative law judges is, however, totally without support anywhere, much less in the record here. Moreover, Bethenergy's speculation ignores its own acknowledgement,

[14] Bethenergy is mistaken if it means to contend further that Section 422(c) and its implementing regulations are both eligibility and liability provisions. If Section 422(c) were an eligibility provision, it would impose the absurd and restrictive requirement as to each Part C claim that the claimant is not eligible for benefits unless his totally disabling pneumoconiosis were proven, or were conclusively presumed, to have arisen not merely out of coal mine employment in general—as Sections 401(a), 402(f)(1)(A), and 411(a) and (b) suggest or require—but out of employment "in a mine during a period . . . *when it was operated by [a particular] operator.*" 30 U.S.C. 932(c) (emphasis added).

Moreover, the result would not change even if Section 422(c) could somehow plausibly be construed as an eligibility provision. When Section 402(f)(2) became law, the Secretary of Labor's rulemaking authority was as broad as the rulemaking authority the Secretary of HEW had enjoyed in promulgating the HEW interim provision. 30 U.S.C. § 902(f)(1) (1976 & Supp II 1978); 30 U.S.C. § 932(h) (1976). Accordingly, the Secretary of Labor's rulemaking authority clearly authorized a rule that, like the HEW interim provision, conclusively presumed "disability causation" for Section 402(f)(2) claims adjudicated under a Section 422(c) "eligibility" provision as posited. *See* Opening Br. at 40, n.25. And if Section 422(c) were an "eligibility" provision, the Secretary would have been bound to promulgate such a rule in order to comply with Section 402(f)(2)'s "not . . . more restrictive" mandate.

Bethen. Resp. Br. at 21, that the Secretary of Labor is also a party to all Part C claims, 30 U.S.C. § 932(k), and, pursuant to Section 422(a), 30 U.S.C. § 932(a), "has all of the defensive rights available to an employer and insurance carrier." Bethen. Resp. Br. at 21. Indeed, if grounds exist to contest a claimant's eligibility in a particular claim as to which the Trust Fund may be liable, the Secretary is obligated to contest it because she is also a trustee for the Trust Fund. 26 U.S.C. § 9501(a)(2) (1988).

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed and the case remanded with directions to award Mrs. Pauley black lung benefits.

Respectfully submitted,

TIMOTHY P. CREANY
BLAIR V. PAWLOWSKI
(Counsel of Record)
603 North Julian Street
P.O. Box 658
Ebensburg, Pennsylvania 15931
(814) 472-7046

JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER
LEGAL ASSISTANCE FOUNDATION
OF CHICAGO
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Petitioner
Harriet Pauley (No. 89-1714)

(13) (11) (1)

Nos. 89-1714, 90-113 and 90-114

Supreme Court, U.S.
FILED
FEB 13 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents,

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

---

JOINT REPLY BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Of Counsel:

JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 775-7154

**Counsel of Record for the Clinchfield Coal Company*

***Counsel of Record for the Consolidation Coal Company*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	2
ARGUMENT IN REPLY	4
I. THE IRREBUTTABILITY THEORY IS NOT BELIEVABLE	4
II. DOL'S INTERPRETATION OF 30 U.S.C. § 902(f)(2) IS CORRECT	6
A. DOL Was in the Best Position to Know What Congress Expected	6
B. X-ray Evidence of Pneumoconiosis Does Not Irrebuttably Presume Disease Causation	7
C. PFT Proof Does Not Conclusively Establish Entitlement to Benefits	11
III. DOL'S RULE MERITS DEFERENCE	15
IV. CONGRESS WOULD NOT HAVE ENACTED A BLACK LUNG PROGRAM DOOMED TO PERPETUAL FINANCIAL CRISIS	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
Bellotti v. Baird, 428 U.S. 132 (1976)	18
Bowen v. Yuckert, 482 U.S. 137 (1987)	13
Broyles v. Director, Office of Workers' Compensation Programs, 824 F.2d 327 (4th Cir. 1987), *aff'd in part, Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988)	5
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	16
Director, Office of Workers' Compensation Programs v. Black Diamond Mining Co., 598 F.2d 945 (5th Cir. 1979)	19
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	8
Pittston Coal Group v. Sebben, 488 U.S. 105 (1988)	*passim*
Schweiker v. Hansen, 450 U.S. 785 (1981)	9
Securities Industries Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137 (1984)	17
Traynor v. Turnage, 108 S. Ct. 1372 (1988)	16
United States v. American Trucking Ass'n, Inc., 310 U.S. 534 (1940)	16
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	14
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. III	17
U.S. Const. amend. V	17
STATUTES AND REGULATIONS:	
26 U.S.C. § 9501(c) (1988)	18
28 U.S.C. § 518(a) (1988)	7
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901- 945 (1988)	3

Table of Authorities Continued

	Page
Section 401(a), 30 U.S.C. § 901(a) (1988)	16
Section 402(b), 30 U.S.C. § 902(b) (1988)	12
Section 402(f)(1), 30 U.S.C. § 902(f)(1) (1988)	10,16,17
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988)	*passim*
Section 402(f)(2)(A), 30 U.S.C. § 902(f)(2)(A) (1988)	6
Section 402(f)(2)(B), 30 U.S.C. § 902(f)(2)(B) (1988)	6
Section 411(a), 30 U.S.C. § 921(a) (1988)	16
Section 411(c)(1), 30 U.S.C. § 921(c)(1) (1988)	14
Section 411(c)(2), 30 U.S.C. § 921(c)(2) (1988)	14
Section 411(c)(3), 30 U.S.C. § 921(c)(3) (1988)	15
Section 411(c)(4), 30 U.S.C. § 921(c)(4) (1988)	4,9
Section 413(b), 30 U.S.C. § 923(b) (1988)	16
Section 422(c), 30 U.S.C. § 932(c) (1988)	3,16,18
Section 423, 30 U.S.C. § 933 (1988)	19
Section 424(a)(1), 30 U.S.C. § 934(a)(1) (1988)	19
Section 435, 30 U.S.C. § 945 (1988)	6
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972)	4
Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978)	6
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978)	6
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312, 313 (1986)	5,19
Fed. R. Evid. 301	14

Table of Authorities Continued

Page

Black Lung Program Regulations
20 C.F.R. § 410.412 (1990) 8
20 C.F.R. § 410.412(a)(1) (1990) 8,9,10
20 C.F.R. § 410.416 (1990) 12,14
20 C.F.R. § 410.416(a) (1990) 11
20 C.F.R. § 410.418 (1990) 11
20 C.F.R. § 410.424-410.426 (1990) 8
20 C.F.R. § 410.426(a) (1990) 8
20 C.F.R. § 410.456 (1990) 12,14
20 C.F.R. § 410.456(a) (1990) 11
20 C.F.R. § 410.458 (1990) 11
20 C.F.R. § 410.490 (1990) ..... *passim*
20 C.F.R. § 410.490(a) (1990) 4
20 C.F.R. § 410.490(b)(1) (1990) 11,13,14
20 C.F.R. § 410.490(b)(2) (1990) ..... *passim*
20 C.F.R. § 410.490(b)(3) (1990) 11,12,13,14
20 C.F.R. § 410.490(c) (1990) ..... *passim*
20 C.F.R. § 410.490(c)(2) (1990) 13
20 C.F.R. § 725.492(a) (1990) 19
20 C.F.R. § 727.203 (1990) 6,12
20 C.F.R. § 727.203(b) (1990) 2,7
20 C.F.R. § 727.203(b)(3) (1990) 2,14,16
20 C.F.R. § 727.203(b)(4) (1990) 2,8,14,16
43 Fed. Reg. 36,826 (1978) 6
43 Fed. Reg. 17,770 (1978) 6

MISCELLANEOUS:

H.R. 7, 94th Cong. 1st Sess. (1975) 15
Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means 97th Cong., 1st Sess. (1981) 5

Table of Authorities Continued

Page

Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 6
Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 11
H.R. Rep. No. 864, 95th Cong., 2d Sess. (1978) 6,15,19
S. Rep. No. 336, 95th Cong., 1st Sess. (1977) 19
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 12
131 Cong. Rec. S15,477-79 (1985) 18
124 Cong. Rec. 3426 (1978) 15
124 Cong. Rec. 2333 (1978) 15
U.S. Department of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 1990) 5
Brief Amicus Curiae of the National Council on Compensation Insurance, *et al., Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) (Nos. 87-821, 87-827 and 87-1095) 5
Social Security Administration, *Coal Miner's Benefits Manual* (1979) 3,7,9,12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1714, 90-113 and 90-114

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

– BETHENERGY MINES INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

---

JOINT REPLY BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

INTRODUCTION

In these consolidated cases, the mine operator parties and the Government seek this Court's affirmation of the validity of the Department of Labor's ("DOL") black lung interim rebuttal regulations at 20 C.F.R. § 727.203(b). The provisions at issue permit a mine operator to demonstrate that it is not liable to pay black lung benefits, if the evidence proves that the miner did not contract black lung disease or, that the miner's total disability or death was not related to this disease. *Id.* § 727.203(b)(3), (4).

The black lung claimant parties in these cases assert that these avenues of inquiry were blocked under the Social Security Administration's ("SSA") interim rules. 20 C.F.R. § 410.490 ("section 410.490"). Accordingly, DOL's rules are more restrictive than SSA's and thus invalid under section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2) ("section 402(f)(2)"). The claimants argue that the invocation of SSA's interim presumption by x-ray, biopsy, autopsy or pulmonary function test ("PFT") evidence[1] irrebuttably presumes that the miner has or had black lung disease and that the disability or death of the miner is causally related to this occupational disease. Section 402(f)(2) of the Act then requires DOL to apply the same irrebuttable presumptions in the claims it adjudicates. Responding to the assertion that DOL's contrary

[1] In No. 90-113, the DOL presumption was invoked on the basis of arterial blood gas tests, a method not available under SSA's rule. The claimant involved in 90-113, John Taylor, adopts the substantive arguments of Mrs. Pauley (No. 89-1714) and Mr. Dayton (No. 90-114) that section 410.490 erects an irrebuttable presumption. Taylor then argues that this irrebuttable presumption applies in his case, even though the SSA rule makes no provision for entitlement based on the results of blood gas tests. Taylor theorizes (incorrectly) that blood gas tests measure the same physical manifestations as PFTs and therefore section 402(f)(2)'s mandate applies to blood gases as well. Brief for Respondent John Taylor at 10, 12. This argument plainly does not work. DOL's criteria for evaluating blood gas evidence are manifestly more favorable to claimants. The restrictivity prohibition of section 402(f)(2) cannot be offended. The points raised by Taylor neither merit nor are accorded any further attention in this Reply Brief.

interpretations are entitled to judicial deference, Pauley and Dayton argue that only SSA's interpretation as reflected in its claims manual is entitled to deference, and, because of the liberal purpose of the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("Act"), claimants' interpretations are also entitled to special respect.

Pauley and Dayton then concede that, in light of 30 U.S.C. § 932(c), individual mine operators cannot be held liable for claims in which it is proven that a miner's disability or death did not arise in part from pneumoconiosis caused by the miner's employment with the operator. Thus, a claimant who is eligible in a case involving a mine owner who cannot be held liable, receives benefits from the Black Lung Disability Trust Fund. This theory makes it unnecessary for the Court to address the due process arguments presented as it insulates employers from liability, where no harm was done to the miner by the employer.

A brief amicus curiae has been filed by the United Mine Workers' of America ("UMWA") in support of the claimants. The National Council on Compensation Insurance ("NCCI"), a workers' compensation insurance industry affiliated organization, and the National Coal Association ("NCA"), a trade association of mine owners and related businesses, have filed amici curiae briefs in support of the mine operators. NCCI points out that the liability advocated by the claimants in these cases is not insured and could not be insured under black lung compensation insurance policies. NCA argues that Congress did not intend to deprive mine operators of any meaningful opportunity to defend black lung claims and urges the Court not to "dump" liability for non-meritorious claims on the Black Lung Disability Trust Fund.

The mine operator parties join the Government in arguing that the irrebuttability theory is neither valid nor even believable. Both the operators and the Government point out that SSA's presumption, while it is complex and perhaps redundant, encompasses the possibility of factual inquiry into the elements of entitlement addressed in DOL's

third and fourth rebuttal methods. This view is supported by the plain language of the SSA rule and the Act.

ARGUMENT IN REPLY

I. THE IRREBUTTABILITY THEORY IS NOT BELIEVABLE

Wholly apart from the tangle of SSA's regulations, the arguments made by the claimants suffer from a lack of believability. The irrebuttability theory cannot be accepted unless one concludes that in 1972, SSA issued eligibility regulations ensuring awards of black lung benefits in a huge number of black lung claims, whether or not a miner was totally disabled by or died due to pneumoconiosis, or even had the disease. The 1972 statute did not in any way authorize such a departure from its plain language.[2] To accept the irrebuttability theory, it is first necessary to conclude that SSA violated the Act.

The next improbable conclusion that must be reached to justify invalidation of DOL's rebuttal rules is that in 1978, Congress expressly validated SSA's violation of the law and that DOL knowingly and willfully disobeyed Congress, or did so in such an obvious way by inadvertence. It is also necessary to believe that DOL's enormous act of disobedience was not noticed by Congress or anyone else until ten years later when this Court decided *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

---

[2] The 1972 amendments to the Act generated SSA's adoption of section 410.490. Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), contains Congress's only statutory amendment enacted in 1972, stating the extent to which proof uncertainties were to be resolved in favor of claimants. This provision erects a rebuttable presumption of eligibility if the miner has fifteen years of mining employment and suffers from a totally disabling respiratory or pulmonary disease. The statute provides: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." In section 410.490(a), SSA stated that it was merely implementing the language and intent of the 1972 amendments. SSA clearly had no authority to take it upon itself to make unwarranted awards, notwithstanding the statute.

Finally, it must be assumed that Congress mandated a largely irrebuttable interim presumption and then failed to fund the billions of benefit dollars it would generate. In *Pittston Coal Group*, the insurance industry, relying on DOL data, reported that the Fourth Circuit's decision in *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), *aff'd in part, Pittston Coal Group*, 488 U.S. at 119,[3] had it been applied from 1978 forward, would increase unfunded benefit costs by from "$3 billion to $6 billion or more." Brief Amicus Curiae of the National Council on Compensation Insurance, *et al.* at 9, *Pittston Coal Group* (Nos. 87-821, 87-827, 87-1095). The Black Lung Disability Trust Fund is $3 billion in debt under the DOL presumption,[4] and if corrective action had not been taken by Congress in 1981, would have faced a $9 billion deficit by 1995.[5] Accordingly, if Congress truly expected the level of irrebuttability suggested here, its miscalculation of the cost of the program was monumental.

There is no proof in the vast legislative history of the program or elsewhere that SSA was authorized to ignore the plain language of the Act in 1972, that DOL deliberately broke the law in 1978, or that Congress would have sanctioned a huge unfunded liability that would, of necessity, fall back on the U.S. taxpayers. While Congress may not always fully appreciate the effects of its actions, the chain of events that must be assumed to accept the irrebuttability theory is not likely to have occurred.

---

[3] The Fourth Circuit's analysis in *Broyles* formed the basis for its decisions in Nos. 90-113 and 90-114.

[4] U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 1990). The aggregate debt would be still higher had Congress not excused all interest payments on the Trust Fund's debt from 1985 to 1990. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986).

[5] *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 271 (1981) (statement of Labor Secretary Raymond J. Donovan).

II. DOL'S INTERPRETATION OF 30 U.S.C. § 902(f)(2) IS CORRECT

A. DOL Was in the Best Position to Know What Congress Expected

Less than two months after enactment of 30 U.S.C. § 902(f)(2), DOL published proposed regulations,[6] including an interim presumption that is virtually identical to the version in section 727.203 finally adopted several months later.[7] It is, therefore, clear that from the beginning DOL interpreted section 402(f)(2) of the Act and SSA's section 410.490 to allow rebuttal in any case in which the miner did not have pneumoconiosis or suffer total disability or death due to this disease. DOL's contemporaneous interpretation was surely informed by some authority. In congressional testimony, DOL had already expressed uncertainty over the exact meaning of the interim presumption. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 146-47 (1977) (statement of Labor Assistant Secretary Elisburg). It is reasonable to assume, however, that the uncertainty was dispelled first through DOL's participation in the legislative process and then when SSA and DOL sat down together, pursuant to congressional instructions to fully coordinate their responsibilities under the 1978 amendments.[8] It also follows that DOL's interpre-

[6] 43 Fed. Reg. 17,770 (1978).

[7] In the document adopting the final rule, DOL listed the public comments received by the agency. No commentator seems to have expressed a belief that DOL's substantive rebuttal provisions violated section 402(f)(2). 43 Fed. Reg. 36,826 (1978).

[8] Under 30 U.S.C. § 945, DOL and SSA were required to review all previously denied and pending claims. The claims were to be passed between the agencies and all of them were to be finally reviewed by DOL under its version of an interim presumption. 30 U.S.C. § 902(f)(2)(A), (B). Congress instructed the two agencies "to establish a satisfactory mechanism to coordinate their responsibilities." H.R. Rep. No. 864, 95th Cong., 2d Sess. 20-22 (1978). If DOL and SSA utilized substantially different eligibility rules, effective coordination would have been almost impossible.

tation of section 402(f)(2) of the Act and section 410.490 reflected in the DOL presumption is consistent with SSA's.[9]

Although lengthy efforts are made by Pauley and Dayton to dissect section 410.490, its cross-references, and the SSA manual to show that section 410.490 and section 727.203(b) are irreconcilably in conflict, the resolution proposed is no more than a result-oriented product that serves Pauley's and Dayton's objectives. They are in no better position than any other outside observer to offer an authoritative interpretation of the meaning of hastily drafted nineteen year old SSA regulations, implementing ambiguous language in a Senate Report, that generally went out of service eighteen years ago, when SSA's program terminated on June 30, 1973.

Section 410.490 is not a manifestly clear rule. It is, at points, redundant and inexplicable. Pauley and Dayton attempt to turn its literary shortcomings to their advantage and reach conclusions with a high degree of certainty, but ultimately leave out too much text to support a coherent theory.

B. X-ray Evidence of Pneumoconiosis Does Not Irrebuttably Presume Disease Causation

Pauley claims that a miner who invokes section 410.490 by x-ray evidence acquires an irrebuttable presumption of

[9] Both Pauley and Dayton urge the Court to defer to SSA's interpretation of section 410.490, but offer only their own views on the meaning of the words in section 410.490 and SSA's manual. There is no direct evidence to speak for SSA. There is no direct proof that SSA and DOL ever disagreed. Moreover, since the Solicitor General is the statutory representative of all executive agencies in this Court, 28 U.S.C. § 518(a), it may be expected that an interpretation of regulatory or statutory language urged by the Solicitor General here, reflects the final considered legal opinion of the executive branch, even if in retrospect.

"disability causation"[10] because no other segment of section 410.490 directly requires a factual inquiry into this element of the case. The mine operators point out that section 410.490(c) addresses this element by cross-referencing other SSA rules (20 C.F.R. §§ 410.412(a)(1), 410.426(a)) that include criteria for determining whether a presumed total disability or death is related to pneumoconiosis ("disability causation"). *See* 20 C.F.R. § 410.426(a). Pauley responds by arguing that the Court should narrow the plain language of the incorporated provisions.[11] This Court's decision in *Pittston Coal Group* rejects an analytic approach that artificially limits the plain meaning apparent in SSA's cross-references. There, this Court would not accept DOL's argument that the word "criteria" in section 402(f)(2) of the Act means only "medical" criteria, but not "other conditions for recovery" appearing among SSA's criteria. *Pittston Coal Group*, 488

[10] Citing dictum in *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 151 (1987), Pauley points out that x-ray proof of pneumoconiosis in the invocation inquiry precludes rebuttal under DOL's "pneumoconiosis" rebuttal section 727.203(b)(4). This is almost always true but not always a proper conclusion. A person may contract pneumoconiosis that is detectible by x-ray from non-coal mine exposures.

[11] Pauley argues that the reference in section 410.490(c) to "section 410.412(a)(1)," rather than all of section 410.412 is inherently meaningful. That is not so. Section 410.412(a)(1) "defines" "total disability" to encompass several components, including an inability to perform comparable and gainful work and disability causation. ("A miner shall be considered totally disabled due to pneumoconiosis if: *his pneumoconiosis prevents* him from engaging in [comparable and gainful work]." (Emphasis supplied.)) The disability causation element is clearly present in section 410.412(a)(1) without reference to any other segment of section 410.412. The cross-reference to sections 410.424-410.426 which in turn provide more detailed criteria for evaluating the listed components of "total disability" appears then at the end of section 410.412(a)(1). It is reasonably clear throughout all of SSA's rules, including section 410.490(c), that the meaning of the term "total disability" is defined in section 410.412(a)(1). This definition invariably focuses on the cause of the disability as well as its extent. This is, in fact, one of the few consistent patterns in SSA's rules. Pauley's attempt to limit the overall definition to exclude reference to causation is unjustified and strained.

U.S. at 116. Here, Pauley asks the Court to excise the disability causation element from SSA's cross-reference. There is no better reason to give "unnaturally limited meaning" to SSA's criteria in this regard than there was in *Pittston Coal Group*. *See id.*

Two explanations are offered to buttress Pauley's theory: (1) that SSA's claims manual does not include the cross-references to section 410.412(a)(1), and (2) that Pauley's reading is consistent with SSA's concern that it was "virtually impossible" for a miner to prove disability causation. Neither argument forms a basis for departure from the text of the rules.

As to the SSA manual, this previously undiscovered document "has no legal force." *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981). As an indication of SSA's interpretation of section 410.490, it is not very helpful to Pauley and Dayton. Paragraph IB6(d) of the manual merely states that total disability or death due to pneumoconiosis is presumed if the criteria in paragraph IB6(c) are met "and there is no evidence that rebuts such finding." This description cross-references paragraph IB3(b) which describes the operation of the statutory presumption in 30 U.S.C. § 921(c)(4). The statutory presumption is expressly rebuttable if the proof shows that the miner does not or did not have pneumoconiosis or that his totally disabling impairment or death did not arise out of coal mine employment. Pauley focuses only on the absence in the manual of any reference to section 410.412(a)(1) in paragraph IB6(e). Yet the manual cross-references other parts of the manual and not the regulations. Not only does the reference in paragraph IB6(c) to IB3(b), as well as the plain language of IB6(d), serve the same apparent function as section 410.490(c)'s reference to section 410.412(a)(1), but arguably, the cross-reference immediately preceding IB6(e) to IB9(g)(1), which in turn discusses "disability due to pneumoconiosis," may have an equivalent purpose. The manual provides no clear path to an understanding of SSA's interpretation of its rule.[12]

[12] As noted in the Brief of Respondent BethEnergy Mines Inc. at 19

Neither does it make any sense to assume that SSA irrebuttably presumed disability causation in light of the "virtually impossible" theory.[13] If it were virtually impossible to determine the cause of a miner's disability or death, then shifting the burden of proof to the defense solves the problem for the claimant and allows for rebuttal in those cases when it is not so difficult. It is not difficult to assign the cause of a disability to a non-respiratory health effect and there would seem to be no reason why SSA would prohibit its claims personnel from denying a claim in which benefits were clearly unwarranted (*e.g.*, the miner was disabled by an auto accident).

If SSA intended to write an irrebuttable presumption of disability causation in 1972, applicable only in Part B claims, it could easily have done so. The approach the agency adopted does not imply that it intended to write a rule that was quite so simple. While the rule may be amenable to several interpretations,[14] the complete elimination of the statutory disability causation requirement (*see* 30 U.S.C. § 902(f)(1)) is the most implausible of the options.

---

n.18, SSA produced a considerable volume of additional operating guidelines that remain undiscovered.

[13] The theory is an overstatement having no genuine factual foundation. *See* Brief of Respondent BethEnergy Mines Inc. at 8-9, 18.

[14] Dayton's Brief repeatedly insists that DOL keeps changing its mind on the precise location of the disability causation inquiry within the text of section 410.490. In its brief to this Court, DOL does not rely upon the section 410.490(c) cross-references to section 410.412(a)(1), but argues instead that neither DOL nor SSA considered the "total disability" rebuttal methods in section 410.490(c) to be exclusive. DOL also points out that section 410.490(b)(2) (which applies to all medical methods for invocation of the SSA rule), by focusing on "impairment" causation also reflects a focus on disability causation in the SSA rule. The differing focal points of the mine operators' arguments and DOL's are not particularly significant, and both arguments are likely to be correct. The SSA rule is riddled with redundancy, as are the manual provisions. It is not at all unlikely that the same meaning may be drawn from several places in the relevant text.

C. PFT Proof Does Not Conclusively Establish Entitlement to Benefits

Dayton argues that when a claimant invokes the SSA presumption by PFT evidence, both disability causation and the existence of pneumoconiosis are irrebuttably presumed. This ascribes a particularly curious intent to SSA, since the agency knew that its PFT invocation criteria were set at essentially normal levels for retired miners,[15] and thus would predict a zero probability that either irrebuttably presumed fact was true in most cases. SSA was given no authority to promulgate a retirement entitlement for older coal miners.

Dayton's PFT argument is based on the theory that benefits can be denied to a miner with qualifying test scores only if the miner is working or able to work. Adopting Pauley's view of section 410.490(c), it does not matter why the miner is not working. Dayton argues that section 410.490(b)(2) (which inquires into the cause of the impairment detected in section 410.490(b)(1)) does not apply in these cases because it functions only if the miner has pneumoconiosis. Rather, section 410.490(b)(3) alone defines the scope of PFT invocation and the presumption it creates.[16] This theory works only if this Court ignores the cross-references in section 410.490(c), the apparent applicability of section 410.490(b)(2) to all medical invocation methods, and the language in sections 410.416(a) and 410.456(a) (which is incorporated by reference into section

---

[15] *See Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA).

[16] Dayton ignores the fact that section 410.490(b)(3) may also be read to defeat the presumption in the face of proof that the miner did not have pneumoconiosis or suffer related disability or death. Section 410.490(b)(3) describes a "presumption" but there is no reason to conclude that it describes an "irrebuttable presumption." SSA knew how to write an irrebuttable presumption where it intended to do so. *See* 20 C.F.R. §§ 410.418, 410.458.

410.490(b)(2)), stating that "persuasive evidence to the contrary" matters. It is also necessary to assume for the PFT theory that SSA's presumption was designed to work like DOL's section 727.203 where predicate (invocation) and ultimate (rebuttal) facts are neatly set out to guide the adjudicator, and the burden of persuasion clearly shifts after invocation.

There is no good reason to ignore either section 410.490(b)(2), the cross-references in section 410.490(c), or the plain language of the various cross-referenced rules. The manual is no help for the reasons noted *infra* at p. 9, and in fact does not even contain the equivalent of section 410.490(b)(3). It does, however, contain the equivalent of section 410.490(b)(2) at paragraph IB6(c)(2), which cross-references paragraph IB4 which, in turn, contemplates rebuttal if the "impairment" established by x-ray, biopsy, autopsy or PFT evidence did not arise out of coal mine employment. Both the manual and section 410.490(b)(2) inquire directly into whether the miner has pneumoconiosis, and neither source suggests irrebuttability in connection with this fact element.[17]

Dayton attempts to finally validate the PFT irrebuttability theory by arguing that the SSA presumption should not be read to sanction the sort of "pre-invocation rebuttal" that would follow from the full implementation of sections 410.416 and 410.456 through section 410.490(b)(2). This argument assumes, erroneously, that SSA's presumption is a burden shifting device like DOL's presumption. DOL's rule is clearly designed for application in

[17] Dayton attempts to blunt the force of section 410.490(b)(2) by stating that prior to 1978, PFT evidence could not be treated as evidence of pneumoconiosis, thus making section 410.490(b)(2) inapplicable in a PFT case. Brief of Respondent Albert C. Dayton at 19, 27 n.17. Although in 1978, the Act was amended to include respiratory impairments arising out of coal mining within the definition of pneumoconiosis, 30 U.S.C. § 902(b), the Senate Committee that proposed this revision noted that this amendment was merely a codification of SSA's existing practices. This was not a substantive change. S. Rep. No. 209, 95th Cong., 1st Sess. 20 (1977).

adversary litigation in which the trier of fact must ultimately find the pivotal facts based upon the complete record. DOL's presumption is enormously beneficial to claimants because, once triggered, the burden of persuasion on all ultimate facts falls to the employer, thus resolving reasonable probabilities in favor of the claimant.

SSA has decided tens of millions of disability and death claims employing a very different and distinctly non-adversarial method in which the SSA adjudicator moves through the elements of the case in series. *See, e.g., Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987) (describing the SSA grid). Most likely, section 410.490 is a crude conglomeration of the grid and the statutory black lung presumptions that allowed SSA's claims personnel to adjudicate black lung cases in a familiar way. The terms "invocation" and "rebuttal" in this setting probably do not have the same meaning that they would have in traditional adversary litigation. More likely, the section 410.490 scheme allowed SSA personnel to look at each element, one at a time, in the overall process of deciding whether or not to make an award.

The SSA adjudicator first established the years of work and then looked at the section 410.490(b)(1) medical evidence. If the requisite years were present and the medical evidence qualified, the claims examiner would go to section 410.490(b)(2) and/or (3) to see if some other information in the file indicated the absence of disease or impairment. The presumption format of paragraphs (b)(2) and (3) probably allowed SSA to skip these steps because, as SSA conceded, it developed no adverse evidence in defense of the agency. There would, therefore, be no "rebuttal" evidence to consider. Turning next to section 410.490(c), the inquiry could be concluded unless SSA knew that the miner was still working or SSA had negative blood gas studies (physical performance tests). *See* section 410.490(c)(2). If there was no such evidence in the file, SSA could then make an award. SSA did not, and would have no reason to, prohibit its claims personnel from investigating each element in the claim in light of all relevant evidence, but

simply set the system up in a way to ensure speedy awards in a non-adversarial setting, partly by making no effort to develop independent evidence and partly by making only a token effort to validate the claimant's evidence. *See* Joint Brief for the Petitioners Clinchfield Coal Company and [illegible]dation Coal Co. at 12-13.

[illegible] is clearly correct in observing that "it is [illegible]he intended purpose of paragraph [410.490] [illegible]ve as a rebuttal provision rather than a substantive requirement." *Pittston Coal Group*, 488 U.S. at 120. At the point of section 410.490(b)(2) or (b)(3) inquiry, the substantive element at issue is whether the miner has pneumoconiosis or impairment arising out of mining employment, notwithstanding the affirmative medical evidence allowing the claim to get past section 410.490(b)(1). DOL's "rebuttal" rules merely reflect the placement of the substantive inquiries directed by sections 410.490(b)(2) and (b)(3) into sections 727.203(b)(3) or (b)(4). This approach is better suited to adversary litigation and ensures that the claimant's presumptive bubble does not burst as soon as "persuasive evidence to the contrary" is introduced.[18]

SSA did not need to protect claimants from a loss of the interim presumption when unfavorable evidence crept into a file, because that evidence was never developed.[19] If Congress gave any clear message to DOL in 1978, it was to instruct DOL to "do as SSA says not as they do."

---

[18] Section 410.490(b)(2) by referencing sections 410.416 and 410.456 incorporates the statutory presumptions in 30 U.S.C. § 921(c)(1) (2). This Court noted that the effect of these two presumptions "is [illegible]ly to shift the burden of going forward with evidence from the claimant to the operator." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976) (citing Fed. R. Evid. 301).

[19] This fully explains the general absence of "rebuttal" case law in SSA claims, except in the cases of working miners. Rebuttal issues cannot arise unless they are raised by the adversary and supported by proof.

If there was any compromise reflected in the final congressional deliberations over section 402(f)(2), it was to this effect.[20] The agreement reached required DOL to validate awards by ensuring the consideration of all relevant evidence and writing an interim presumption that would clearly promote this objective. H.R. Rep. No. 864, *supra* n.8, at 16; 124 Cong. Rec. 2333 (1978) (statement of Senator Javits); *id.* 3426 (statement of Congressman Perkins). There is no clear indication anywhere that SSA actually wrote largely irrebuttable interim criteria or that DOL was expected to design such a rule for its own claims.

III. DOL'S RULE MERITS DEFERENCE

Apart from section 402(f)(2) of the Act, no legitimate argument can be made that DOL's rebuttal rules violate any provision of the Act. To the contrary, a strong argument can be made that, with one express but non-germane exception,[21] the Act compels inquiry into each factual element of a claim in every case. Dayton and Pauley answer the pervasive statutory focus on the existence of pneumoconiosis, and the establishment of a connection between the disease and total disability or death by arguing (1) that section 402(f)(2) repealed these pre-existing provisions by implication, or (2) by rationalizing the various provisions to the point of inapplicability.

---

[20] Dayton, Pauley, and the UMWA argue that section 402(f)(2) reflects a congressional compromise that must be honored by this Court. Purportedly, the compromise mediated industry's wish for new permanent eligibility regulations with the views of those in favor of a largely irrebuttable interim presumption. This theory falters for a lack of proof demonstrating a belief by anyone that SSA's interim presumption was in any way irrebuttable. Congress did compromise the Senate's preference for the development of new DOL criteria for all claims with the House's preference for applying the interim criteria in all claims. This in no way implies the irrebuttability of the SSA's criteria. The House independently proposed but rejected the use of irrebuttable presumptions. *See, e.g.*, H.R. 7, 94th Cong., 1st Sess. § 3(a) (1975).

[21] The Act contains an irrebuttable presumption of entitlement in the case of a miner suffering from "complicated" pneumoconiosis, the most advanced and life threatening stage of the disease. 30 U.S.C. § 921(c)(3).

There is no case to be made here for repeal by implication of, for example, 30 U.S.C. §§ 901(a), 902(f)(1), 921(a), 923(b), or 932(c). *See Traynor v. Turnage*, 108 S. Ct. 1372, 1381 (1988) (holding that repeal by implication will not lie unless such a construction is "absolutely necessary"). The rationalizations are based on the premise that section 410.490 and thus section 402(f)(2) really do compensate total disability or death due to pneumoconiosis, but that factual inquiry into the truth is barred by irrebuttability. The argument is circular and is disproved by the fact that SSA did not write and DOL was not ordered to write an interim rule in which the existence of pneumoconiosis or related disability or death are beyond the scope of factual inquiry. There is, in sum, nothing in the Act to invalidate DOL's rebuttal rules.

If DOL's interpretation of section 402(f)(2) to allow factual rebuttal by the methods set forth in section 727.203(b)(3), (4) is permissible under the Act, these rules may not be struck down. At its very best, section 402(f)(2) of the Act is not a precise mandate. It requires a review of section 410.490 and section 410.490 is certainly amenable to several different interpretations. The best Dayton and Pauley are able to do by their extensive investigations of section 410.490 and SSA's manual is to prove ambiguity. Section 410.490 simply does not use any words to assure the reader that the irrebuttability theory is correct or even likely. The ambiguity alone is enough to sustain DOL's rule. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). It is all the more appropriate for this Court to sustain DOL's rules because the interpretation advanced by Pauley and Dayton leads to absurd results "plainly at variance with the policy of the legislation as a whole." *See United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940).

Pauley suggests that this Court should defer to SSA and Dayton suggests that this Court should favor the claimant's interpretation of the Act. Both contend that

DOL's position reflects only the litigating position of its attorneys. These points merit little discussion.

First, it is DOL's rule that is being reviewed and thus it is DOL's interpretation of section 402(f)(2) that matters. SSA had no legal authority to promulgate any rules governing these cases. 30 U.S.C. § 902(f)(1). Even if SSA's prior interpretation of section 410.490 may be considered to have been codified in section 402(f)(2), there is no compelling insight into what SSA meant, or any proof that the two agencies disagreed. A deference exercise focusing on SSA is neither helpful nor appropriate.

Next, courts do not defer to the statutory interpretations of private litigants. There is no basis in the Constitution of the United States or in our jurisprudence for ever according a private party the power to bind Article III courts to the party's own opinions on the meaning of congressional enactments affecting him. The Due Process Clause should, in fact, preclude this result.

Finally, this Court is not faced here with the task of reviewing an agency's litigating position. The subject under review is an agency regulation that was adopted many years before the issues in these cases emerged in litigation. Whatever the agency's lawyers say in court, the fundamental position of the agency has never wavered, and it is due the respect it deserves. *Securities Industries Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984). Neither has DOL's rationale ever changed. The agency has maintained consistently that the Act, considerations of fairness, and the Due Process Clause of the Fifth Amendment require the agency to provide mine operators with a fair hearing in black lung claims. The only thing Pauley and Dayton can show is that DOL's lawyers over time have had some difficulty penetrating the verbiage of section 410.490 and its cross-references. The same is true for employers' lawyers and Mrs. Pauley's lawyers who agreed in *Pittston Coal Group* that section 402(f)(2) did not invalidate DOL's rebuttal rules. *See* Joint Brief for the Petitioners Clinchfield Coal Company and

Consolidation Coal Company at 5 n.2. Lawyers for agencies may refine their theories without compromising the otherwise proper views of their executive branch clients. *Bellotti v. Baird*, 428 U.S. 132, 143 & n.10 (1976).

IV. CONGRESS WOULD NOT HAVE ENACTED A BLACK LUNG PROGRAM DOOMED TO PERPETUAL FINANCIAL CRISIS

At various points in their briefs, Pauley and Dayton refer to black lung benefits as "social benefits" or "entitlements" revealing an apparent belief that the courts should find ways to pay everybody in obedience to some hidden statutory purpose. Thus, it is not troubling to them if benefits are awarded to people who do not have black lung disease or who have not been harmed by this disease. This reasoning then ultimately comes to rest on the theory that employers, indeed, cannot be held liable for these clearly non-meritorious cases in keeping with 30 U.S.C. § 932(c). Instead, the claims should be paid by the Black Lung Disability Trust Fund.

The workers' compensation insurance industry stated in its brief amicus curiae that it never insured the claims that would be approved under an irrebuttability theory and that its liability, which is strictly contractual and not statutory, probably would not extend to the coverage of cases like Dayton's and Pauley's. Brief Amicus Curiae of the National Council on Compensation Insurance at 9 n.11. At the same time, Congress has always been acutely aware of the economic reality that the manufacturers excise tax on coal that finances the Trust Fund cannot be increased significantly without doing great harm to the coal industry, energy markets, and the public. *See* 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14,1985) (remarks of Senators Heinz and Warner). When there are no coal tax dollars in the fund to pay claims, the fund borrows from the U.S. Treasury which, in turn, expects repayment with interest. 26 U.S.C. § 9501(c). Congress has, however, found it necessary to place a moratorium on interest accruals because they are likely to be non-recoverable from the coal industry

in any case. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, *supra* n.4. The cost of the benefits sought by Pauley and Dayton will surely fall on the taxpayer. It seems that for Pauley and Dayton SSA's Part B program is simply preferable in all respects to DOL's program and they are essentially seeking its reenactment in this Court.

The adoption of this theory would do great violence to Congress's intent. Noting that substantially all of the costs of the program were being paid by the taxpayer, the Senate Finance Committee in 1977, concluded that this was improper and that these costs should be borne by the coal industry. S. Rep. No. 336, 95th Cong., 1st Sess. 2, 6-8 (1977). The Trust Fund concept emerged from this objective. The Fund's liability was limited to claims in which the miner quit work before January 1, 1970, claims for which there is no responsible operator required to secure the payment of benefits,[22] or where the operator is insolvent or uninsured. H.R. Rep. No. 864, *supra* n.8, at 25; 30 U.S.C. § 934(a)(1). Congress did not at any time expect or intend that differing eligibility criteria would apply depending upon whether the claim was paid by the Fund or an operator. This conclusion would not in any way have been consistent with the benefit financing scheme adopted. *See Director, Office of Workers' Compensation Programs v. Black Diamond Mining Co.*, 598 F.2d 945, 953 (5th Cir. 1979). Nothing in the Act or the legislative history supports the Trust Fund liability theory.

The theory may avoid the constitutional problems raised in these cases and might actually benefit mine operators in the short run and certainly insurers, but it is no more than a contrivance to make it easier to reach a wrong result in these cases. Congress, as much as anything else, intended to enact a financially sound black lung program.

---

[22] An operator is required to "secure" the payment of benefits to all potentially eligible employees. 30 U.S.C. § 933. There is "no operator" required to secure payment only if the employer of the miner went out of business before July 1, 1973. 20 C.F.R. § 725.492(a).

It could not have enacted a new open-ended social program for coal miners or a private liability program doomed to failure. This intent should be respected.

CONCLUSION

The decisions of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed and the decision of the Third Circuit in No. 89-1714 should be affirmed.

Respectfully submitted,

ALLEN R. PRUNTY**
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Of Counsel:
JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
U.S. National Bank Building
P.O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS*
LAURA METCOFF KLAUS
ARTER & HADDEN
Suite 400
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

**Counsel of Record for the Clinchfield Coal Company*

***Counsel of Record for the Consolidation Coal Company*

FOR ARGUMENT

(17) (15) (14)

Supreme Court, U.S.
FILED
FEB 13 1991
OFFICE OF THE CLERK

Nos. 89-1714, 90-113, and 90-114

In the Supreme Court of the United States

DISTRIBUTED
FEB 13 1991

OCTOBER TERM, 1990

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
AND JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
AND ALBERT C. DAYTON

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FOURTH CIRCUITS

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ROBERT P. DAVIS
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	13, 14
Consolidation Coal Co. v. *Smith*, 837 F.2d 321 (8th Cir. 1988)	11
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	2
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988)	2, 11
Public Employees Retirement System v. *Betts*, 109 S. Ct. 2854 (1989)	14
Railroad Retirement Bd. v. *Alton R.R.*, 295 U.S. 330 (1935)	17
Underhill v. *Peabody Coal Co.*, 687 F.2d 217 (7th Cir. 1982)	8
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	3, 15
Constitution, statutes and regulations:	
U.S. Const. Amend. V (Due Process Clause)	15
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*:	
§ 401(a), 30 U.S.C. 901(a)	10, 14
§ 402(b), 30 U.S.C. 902(b)	4
§ 402(f)(2), 30 U.S.C. 902(f)(2)	2, 10, 12, 13, 14, 15
§ 411(a), 30 U.S.C. 921(a)	2, 10, 14
§ 411(c), 30 U.S.C. 921(c)	14, 15
§ 411(c)(3), 30 U.S.C. 921(c)(3)	15
§ 411(c)(4), 30 U.S.C. 921(c)(4)	5, 9, 10, 14
§ 412(a)(1), 30 U.S.C. 922(a)(1)	2, 10, 14
§ 422(a), 30 U.S.C. 932(a)	16
§ 422(c), 30 U.S.C. 932(c)	2, 10, 15, 16
§ 422(c)(1), 30 U.S.C. 932(c)(1)	16
§ 424, 30 U.S.C. 934	16
26 U.S.C. 9501(d)(1)	16
20 C.F.R.:	
Section 410.403(b) (1972)	7
Section 410.412(a)(1)	12

Statutes and regulations—Continued: Page

Section 410.490(b)(1) 3
Section 410.490(b)(1)(i) 3
Section 410.490(b)(1)(ii) 3, 5
Section 410.490(b)(2) 3, 4, 9, 10, 11, 12
Section 410.490(b)(3) 4, 5
Section 410.490(c) 11, 12
Section 727.203(b)(3) 2, 8
Section 727.203(b)(4) 2

Miscellaneous:

Black Lung Benefits Act Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 3
Black Lung Legislation, 1971-72: Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st & 2d Sess. (1972) 8
Coal Miner's Benefits Manual (Pt. IV), Temp. Instr. No. 21 (1972) 5, 10, 11, 12
43 Fed. Reg. (1978):
p. 17,765 12
p. 17,771 12
p. 36,826 12
GAO, *Report to the Congress, Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows* (1972) 7, 8
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 10
H.R. Rep. No. 460, 92d Cong., 1st Sess. (1971) 7
S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 5

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1714

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY, PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

No. 90-113

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

No. 90-114

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FOURTH CIRCUITS

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

The Black Lung Benefits Act provides benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108 (1988), citing *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). See also 30 U.S.C. 921(a), 922(a)(1), 932(c) (provisions authorizing the payment of benefits for total disability or death "due to pneumoconiosis"). The third and fourth rebuttal methods contained in DOL's presumption regulation, which are at issue in these consolidated cases, ensure consideration of all of the statutory elements of entitlement by allowing a party contesting entitlement to prove that the miner did not have pneumoconiosis or did not become totally disabled from the disease. 20 C.F.R. 727.203(b)(3) and (4).

The claimants argue that Congress, by providing in Section 402(f)(2) of the Act that DOL's "[c]riteria * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973" (30 U.S.C. 902(f)(2)), required DOL to ignore whether a miner had pneumoconiosis or whether his disability was caused by the disease. Thus, Dayton and Taylor contend that a miner who does not have pneumoconiosis, but is unable to do coal mine work because of a reduced ventilatory capacity resulting solely from age, obesity, or cigarette smoking, is entitled to black lung benefits. In Pauley's view, if a working miner with simple pneumoconiosis becomes totally disabled due to a non-work related cause such

as a heart attack or an automobile accident, the coal industry has to pay him black lung benefits.

The claimants have not shown that they would have obtained benefits on June 30, 1973, under the "criteria" applied by HEW, which administered the program at that time. In any event, they have failed to show that Congress intended to mandate such results, and serious constitutional problems would be presented by requiring the coal industry to pay black lung benefits to miners who do not have the disease or are not disabled by it.

1. *Criteria applied by HEW.* In our opening brief we recognized (Br. 16) that it is not clear exactly how HEW applied its opaque presumption regulation, 20 C.F.R. 410.490. In our view, however, in order to invoke HEW's presumption, claimants first had to establish the existence of a respiratory or pulmonary impairment (subsection (b)(1)), and next had to show that their disability was due to pneumoconiosis (subsection (b)(2)). The burden of showing that the miner was not totally disabled then shifted to the person challenging entitlement to benefits.[1]

---

[1] The presumption was useful to claimants, as a practical matter, because the proof required to establish the existence of an impairment under subsection (b)(1) did not necessarily show an impairment that was severe enough to cause total disability. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (simple pneumoconiosis, evidence of which satisfies subsection (b)(1)(i), is seldom disabling); *Black Lung Benefits Act Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-275 (1977) (testimony of Dr. Harold I. Passes, former Acting Chief Medical Officer of the Bureau of Hearings and Appeals of the Social Security Administration) (the ventilatory test values set out in subsection (b)(1)(ii) do not prove total disability).

a. Dayton acknowledges (Br. 26) that subsection (b)(2) of HEW's regulation, which states that the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment," required the claimant to prove that the miner's impairment was caused by pneumoconiosis.[2] Thus, Dayton appears to agree that the question whether he has pneumoconiosis is critical to his claim. Yet Dayton then contends that subsection (b)(3) of HEW's regulation, which states that a miner presenting qualifying ventilatory study scores "will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment * * * if he has at least 10 years of the requisite coal mine employment," would have allowed him to avoid the requirements set out in subsection (b)(2). In Dayton's view (Br. 26), subsection (b)(3) "is not a third co-equal invocation requirement but * * * is a means of satisfying the causation requirement" of subsection (b)(2). Thus, under Dayton's construction of subsection (b)(3), a miner with the requisite experience who presented qualifying ventilatory study scores was *conclusively* presumed by HEW to suffer from pneumoconiosis.[3] By this sleight of hand, Dayton claims that the

[2] Congress defined "pneumoconiosis" to mean "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). Because a claimant had to show that a miner's respiratory or pulmonary impairment "arose out of coal mine employment" under subsection (b)(2), that subsection required claimants to prove that the miner had "pneumoconiosis" as defined by the Act.

[3] Dayton repeatedly refers to "conclusive presumptions" in HEW's regulation or alternatively states that claimants were "conclusively presumed" under the regulation to satisfy an element of entitlement. See Br. 4, 11, 15, 25 n.6, 32, 33 & n.21.

Fourth Circuit correctly held that whether he has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*.

Since it has been determined that Dayton does not have pneumoconiosis (90-114 Pet. App. 11-12, 24-26), his entire argument hinges on his claim that he would have had the benefit of a conclusive, or irrebuttable, presumption. HEW's regulation, however, does not state that anything was *conclusively* presumed. HEW's Manual stated, to the contrary, that a miner in Dayton's precise circumstances would not be awarded benefits if there was "evidence that *rebuts* * * * a finding" that he is "totally disabled due to pneumoconiosis." Coal Miner's Benefits Manual (Pt. IV), Temp. Instr. No. 21, § 1B6(d) (1972) (emphasis added). Thus, HEW did not regard its regulation as establishing a conclusive presumption of entitlement to benefits. And evidence that a miner does not have pneumoconiosis necessarily rebuts the presumption that he is disabled by it.[4]

Furthermore, and most fundamentally, Dayton never comes to grips with the fact that he seeks black lung benefits even though it was determined that he does not have black lung disease. There is no good

[4] Our construction of the regulation gives meaning to subsection (b)(3). That subsection allowed a miner with only ten years' experience to invoke the presumption on the basis of ventilatory study scores. In the absence of subsection (b)(3), a claimant relying on ventilatory studies would have been required to show 15 years of coal mine work, as stated in subsection (b)(1)(ii). HEW apparently set out the 15-year requirement established by 30 U.S.C. 921(c)(4) in subsection (b)(1)(ii), and then implemented Congress's instruction not to apply the 15-year requirement rigidly (S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972)) by lowering the requirement to ten years in subsection (b)(3).

reason to think that HEW would have awarded benefits in such a case.[5]

b. Pauley had simple pneumoconiosis and was disabled, but his "disability did not arise even in part out of coal mine employment." 89-1714 Pet. App. 13. With respect to DOL's fourth rebuttal method, Pauley acknowledges (Br. 20) that, in x-ray cases such as his, although the method "lacks a discrete companion test in the HEW interim provision, it does not set forth more restrictive criteria than those in the HEW interim provision." However, Pauley contends that DOL's third rebuttal provision, which provides for rebuttal where "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment," is invalid. Where Dayton and Taylor find a conclusive presumption of pneumoconiosis in HEW's regulation, Pauley finds a conclusive presumption of "disability causation," by which he means that the miner was

[5] Nor does Taylor, who like Dayton was found not to have black lung disease (90-113 Pet. App. 18a-19a, 27a-31a), suggest why he should be entitled to benefits. Taylor instead merely adopts Dayton's arguments (Br. 7) and goes on to argue that he is entitled to benefits even though he invoked DOL's presumption by presenting blood-gas studies, a method of invocation that was not available under HEW's regulation. Taylor's argument, in summary, is that he should be deemed to have constructively invoked HEW's presumption since blood-gas studies, like ventilatory test scores, show the presence of a chronic respiratory or pulmonary impairment. There is no merit to this argument. The evidence in Taylor's case showed *non-qualifying* x-ray evidence and ventilatory study scores (90-113 Pet. App. 27a), and his blood-gas study scores do not change that fact. Since it is undisputed that Taylor would not have qualified for benefits under HEW's regulation, it should be undisputed that DOL's regulation is not "more restrictive" as applied in his case.

rendered disabled by pneumoconiosis rather than from some other disease or from an injury.[6]

The premise for Pauley's argument is that early in its administration of the black lung program, HEW supposedly decided to eliminate any inquiry into the cause of a miner's disability because doing so was too difficult. 89-1714 Pet. Br. 3-6, 28-30. In fact, however, HEW required in the early years of its administration that pneumoconiosis had to be the "primary reason" for a miner's disability. 20 C.F.R. 410.403(b) (1972); GAO, *Report to the Congress, Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows* 26 (1972) [*1972 GAO Report*]. HEW did not apply this rule harshly: "Although the weight of medical opinion holds that pneumoconiosis is seldom the cause of disabling impairment until and if it reaches the complicated stage," HEW generally granted benefits "where the X-ray evidence discloses only first-stage (simple) pneumoconiosis accompanied by severe impairment of breathing." H.R. Rep. No. 460, 92d Cong., 1st Sess. 25 (1971) (minority views).[7] But HEW denied benefits where it was clear that the miner's death was not caused by pneumoconiosis. Thus, HEW "almost always denied" benefits where a death occurred less than 24 hours after the

[6] Like Dayton, Pauley repeatedly speaks of a "conclusive presumption" in HEW's regulation or says that disability causation was "conclusively presumed" (see Br. 15, 22, 40 n.25), even though nothing in the regulation suggested that it established irrebuttable presumptions.

[7] Pauley quotes from this report (89-1714 Pet. Br. 5) in support of his contention that it is "a very difficult problem from a medical standpoint" to determine the cause of disability, without noting that he is relying on the *minority* views.

onset of an acute disease such as a "coronary occlusion[]" (*1972 GAO Report* 36), or where a miner died "in an automobile accident," or from "malignancy in other organs of the body" (*Black Lung Legislation, 1971-72: Hearings Before the Subcom. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 524, 539-540 (1972) [*1972 Senate Hearings*]). There is no reason to believe HEW would have ignored the statute and granted benefits if the evidence showed, for example, that a heart attack or an automobile accident had disabled a miner.[8]

Nor has Pauley shown that HEW responded to the 1972 amendments by ignoring the statutory requirement that benefits should be awarded only in cases

[8] Pauley's speculation that HEW decided to abolish the disability causation inquiry based on a cost-benefit analysis is faulty even on its own terms. Determining the cause of a miner's disability is not "virtually impossible," as Pauley repeatedly asserts (Br. 3, 6, 16, 28, 29) on the basis of a quote from an official in the Social Security Administration. Doctors can identify the cause of a miner's lung impairment to a reasonable degree of medical probability, as they do under state workers' compensation laws. *1972 Senate Hearings* 166 (statement of Dr. Rankin); see also *Underhill* v. *Peabody Coal Co.*, 687 F.2d 217, 223 (7th Cir. 1982) (allowing black lung rebuttal under a "reasoned medical judgment" standard). Where a disabled miner with pneumoconiosis also suffers from a non-pulmonary disease, it is even easier to determine the cause of the miner's disability. To the extent that identifying the cause of a disability is difficult, DOL's regulation fully protects miners' interests by requiring the party contesting entitlement to prove that the disability did not arise even "in part" from coal mining. 20 C.F.R. 727.203 (b)(3). Pauley has failed to contest the ALJ's finding that her husband's disability arose from arthritis and paralysis from a stroke, and not in whole *or in part* from pneumoconiosis.

where death or disability was caused by pneumoconiosis. Those amendments, after all, created a presumption in Section 411(c)(4) for certain long term miners who had a totally disabling respiratory or pulmonary impairment, and expressly *conditioned* the presumption by allowing for rebuttal by proof that a miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. 921(c)(4).[9] Indeed, it would have been perverse for HEW to react to the congressional enactment of an explicit disability causation condition by eliminating such a requirement from the regulations implementing the statute. In our view, subsection (b)(2) of HEW's regulation, which states that the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment," incorporated the disability causation requirement.

Subsection (b)(2) can be read as merely establishing a "disease causation" requirement—a requirement that the claimant establish that his respiratory impairment was caused by exposure to coal mine dust rather than some other type of dust. But there are a number of good reasons to read subsection (b)(2) as including a disability causation requirement as well. First, the language of the subsection—"[t]he impairment * * * arose out of coal mine employment"—naturally may be read that way. Moreover, that language seems to have been borrowed from Section 411(c)(4)—which allows for rebuttal where the "impairment did not arise out of, or in connection with, employment in a coal mine." Such borrowing is likely

[9] The fact that Congress in 1972 included a disability causation provision in Section 411(c)(4) further undercuts Pauley's argument that it was thought to be virtually impossible to determine the cause of a miner's disability.

to have occurred since the regulation containing subsection (b)(2) was promulgated in 1972 shortly after the enactment of Section 411(c)(4). Because Section 411(c)(4) indisputably establishes a disability causation requirement, it is reasonable to construe subsection (b)(2) similarly.[10]

In addition, HEW's manual implemented subsection (b)(2) by stating that a miner was "*presumed* to be totally disabled due to pneumoconiosis arising out of coal mine employment * * * if he has at least 10 years of underground or comparable coal mine employment * * * and there is no evidence that *rebuts* such a finding." Section IB6(d). Evidence that a miner's disability is *not* due to coal mine employment obviously rebuts that presumption. Moreover, construing the regulation as a conclusive presumption of disability causation puts the regulation at odds with the statute, which repeatedly makes clear that black lung benefits are to be awarded to persons whose disability is "due to pneumoconiosis." 30 U.S.C. 901(a), 921(a), 922(a)(1), 932(c). And Pauley's construction leads to absurd results: under it, a miner would be entitled to black lung benefits even if it were clear that his disability resulted from a traffic accident that was totally unrelated to his employment.[11] Finally, as discussed below, the adop-

---

[10] The Conference Committee that adopted Section 402(f)(2) stated that "all standards are to incorporate the presumptions" set out in Section 411(c)." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).

[11] Pauley suggests (Br. 15-16) that her construction is supported by the fact that no reported case has been located in which HEW denied benefits in such circumstances. Dayton similarly notes (Br. 32) that no case held that HEW could not award black lung benefits to persons who did not have black lung disease. But it may be that no one thought to pursue a claim for black lung benefits in such circumstances. That conclusion is supported by the fact that no one challenged the validity of DOL's rebuttal provisions for nearly ten years. See *Consolidation Coal Co.* v. *Smith*, 837 F.2d 321, 323 & n.3 (8th Cir. 1988) (Benefits Review Board raised the issue sua sponte); *Sobben*, 488 U.S. at 119 (the claimants conceded the validity of DOL's rebuttal provisions).

tion of Pauley's construction would lead to a serious due process problem if coal companies were required to pay black lung benefits even where they could show that a miner's disability is totally unrelated to his employment.[12]

c. It may be that no interpretation of HEW's regulation can make total sense of it. The regulation was not drafted with precision. While we believe HEW's regulation authorizes rebuttal by the methods explicitly set forth in DOL's third and fourth provisions, HEW's regulation admittedly does not do

---

[12] Clinchfield and Consolidation Coal suggest (Br. 28 n.34) that HEW's presumption regulation would not have been particularly useful if subsection (b)(2) included a disability causation inquiry. That is not so. First, while HEW's manual is not clear on this point, HEW may have shifted the burden of persuasion to the party contesting eligibility with respect to the disability causation issue, even though subsection (b)(2) is in the invocation portion of the regulation. See Manual Section IB6(d). Second, under our reading, the regulation creates a presumption that a miner presenting the requisite x-ray or ventilatory study evidence suffers from a *totally* disabling impairment, and in subsection (b)(2) authorizes the party contesting eligibility to show that coal mine employment was not the cause of the miner's total disability; if the party contesting eligibility cannot do so, then that party may attempt to rebut the presumption under subsection (c) by showing that the miner is not, in fact, totally disabled. Under this reading of the regulation, a miner may obtain its key benefit—a presumption of total disability based on medical evidence that merely shows an impairment. See note 1, *supra*.

so as clearly.[13] But DOL officials reported shortly after the passage of the 1978 amendments that HEW did not consider its two express rebuttal provisions to be exclusive. 43 Fed. Reg. 36,826 (1978).[14] DOL proposed the presumption regulation at issue less than two months after the enactment of Section 402(f)(2). 43 Fed. Reg. 17,765, 17,771 (1978).[15]

In these circumstances, it is best to presume, as the Third Circuit did, that HEW's regulation complied with the statute by allowing the equivalent of DOL's third and fourth rebuttal methods. Whether, under HEW's regulation, the inquiries into disabil-

[13] While agreeing with us that HEW's regulation allowed for rebuttal by methods comparable to DOL's third and fourth methods, Consolidation and Clinchfield Coal come to that conclusion somewhat differently. The coal companies join us in arguing that subsection (b)(2) requires proof that the miner has pneumoconiosis. But they conclude (as did the Third Circuit) that HEW's regulation authorizes a disability causation inquiry by tracing through the cross-references in subsection (c). The cross-referenced regulation provides that a miner would be considered totally disabled if "pneumoconiosis prevents him" from engaging in specified work. 20 C.F.R. 410.412(a)(1). As the coal companies and the Third Circuit state, that regulation thus seems to incorporate a disability causation inquiry.

[14] DOL did not state whether HEW authorized additional forms of rebuttal under subsection (b)(2), as its manual provides (§ IB6(d)), or under subsection (c), as the cross-references in that provision would allow.

[15] The claimants argue that DOL's interpretation of Section 402(f)(2) should receive no deference. But the Secretary's contemporaneous construction of the statute was that Congress had authorized DOL's third and fourth rebuttal methods and HEW's regulation did not foreclose them. We believe this construction is entitled to deference, and that such deference is not precluded by the ambiguities in HEW's regulation.

ity causation took place before or after invocation, with ten years of coal mining or with 15, and with or without a shift of the burden of persuasion is irrelevant because DOL's regulation gives claimants the benefit of the doubt on each of these issues, and therefore is not more restrictive than HEW's regulation.

2. *Congressional intent.* In our opening brief, we showed that because Congress in Section 402(f)(2) required DOL to apply criteria "not * * * more restrictive than [those] *applicable to* a claim filed on June 30, 1973" (emphasis added), the ultimate question is what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied. We also showed that Congress must have understood that Part B claims would be denied where a miner was not totally disabled "due to pneumoconiosis," and that a contrary construction of Section 402(f)(2) posed serious constitutional problems.

a. Pauley appears to believe (Br. 37-38) that HEW's regulation is all that matters, and that Part B of the Act is essentially irrelevant in construing Section 402(f)(2). Dayton admits (Br. 32) "that, for purposes of Section 402(f)(2) analysis, the central question is what 'criteria' were 'applicable' under Part B (and under the HEW interim provision in particular), not what criteria HEW actually applied." Yet in Dayton's view (Br. 33), what HEW thought is all that matters because the agency's construction of the statute is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

The *Chevron* standard does not allow an agency to override an act of Congress. To the contrary, a regulation is invalid, despite the deference due under

Chevron, where the regulation is "contrary to the statute." 467 U.S. at 844. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842. It is where "the statute is silent or ambiguous with respect to the specific issue" that the question becomes whether "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. See *Public Employees Retirement System* v. *Betts*, 109 S. Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself"). Congress stated that the purpose of the Black Lung Benefits Act is to provide compensation for "death or total disability due to pneumoconiosis." 30 U.S.C. 901(a). In Part B of the Act, Congress authorized HEW to promulgate regulations providing for "payments of benefits in respect of total disability of any miner due to pneumoconiosis." 30 U.S.C. 921(a). Congress further enacted the presumption in Section 411(c)(4), 30 U.S.C. 921(c)(4), which evpressly provides for rebuttal by proof that a miner does not have pneumoconiosis or is not totally disabled as a result of the disease. In the next section of Part B, Congress set forth rate schedules for benefits to be paid "[i]n the case of total disability of a miner due to pneumoconiosis." 30 U.S.C. 922(a)(1). If HEW's regulation made it irrelevant that a miner was not disabled due to pneumoconiosis, the regulation was contrary to the statute.[16]

[16] Pauley suggests (Br. 39) that "Congress elevated the HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the *statutory* standard of restrictiveness for the 'criteria' the Secretary of Labor could apply." But that is not what Section 402(f)(2) says. Moreover, Pauley admits (Br. 44 n.28) that "a review of the legislative history reveals a decided silence with respect to whether members of Congress were aware or not that the HEW interim provision lacks a 'disability causation' test." In other words, nothing shows that Congress thought black lung benefits had to be awarded to a miner who was not totally disabled due to pneumoconiosis.

Moreover, in creating a regime of statutory rebuttable presumptions in Section 411(c), which is in Part B of the Act, Congress must have understood that rebuttability principles applied generally under Part B. The exception to that rule was the irrebuttable presumption set forth in Section 411(c)(3), 30 U.S.C. 921(c)(3), which provides that claimants presenting x-ray, biopsy, or autopsy evidence of complicated pneumoconiosis are entitled to benefits. But Section 411(c)(3), unlike HEW's regulation, explicitly states that it creates an "irrebuttable" presumption. And even with respect to that provision, this Court held in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 22 n.21 (1976), that a statutory gloss was required to make clear that "an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." Congress was surely aware of this Court's 1976 decision in *Turner Elkhorn* when it enacted Section 402(f)(2) in 1978, and it must have understood that to the extent causation requirements were not expressly set forth in HEW's presumption regulation, such requirements were implicitly imposed by the statute and the Constitution.

b. As the decision in *Turner Elkhorn* also shows, our construction of Section 402(f)(2) is supported by the need to avoid a serious constitutional question concerning the validity, under the Due Process Clause, of imposing liability on coal mine operators for disabilities that do not arise out of coal mining. The claimants attempt to avoid this question by construing Section 422(c), 30 U.S.C. 932(c), to allow individual coal mine operators to escape liability for

benefits in cases where total disability was not "due to pneumoconiosis," while preserving a claimant's eligibility for benefits by shifting liability to the Black Lung Disability Trust Fund in such cases. 89-1714 Pet. Br. 45-46; 90-114 Resp. Br. 45. This attempt not only misconstrues the purpose of Section 422(c), but also fails to eliminate the constitutional problem.

Section 422(c) provides rules that govern coal industry responsibility for black lung benefits. In general, individual coal mine operators are liable, but in certain circumstances liability shifts to the Black Lung Disability Trust Fund, which is financed by a tax on coal. See 30 U.S.C. 932(c), 934; 26 U.S.C. 4121(a), 9501.[17] There is no indication in this apportionment of liability scheme that different adjudicatory rules apply depending on whether the Trust Fund or an individual operator is liable for benefits. To the contrary, Section 422(a), 30 U.S.C. 932(a), appears to provide that the same rules and procedures will apply to the operators and the Trust Fund. The claimants' creation of different rules depending on whether benefits are paid by the Trust Fund or an individual operator has no basis in the statute, which does not hint that the Trust Fund would be required to pay benefits to miners who are not totally disabled due to pneumoconiosis.

Even if the claimants' interpretation of Section 422(c) made sense, however, it would still not elimi-

[17] For example, the Trust Fund pays benefits where disability "did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator" (30 U.S.C. 932(c)(1)), and where the responsible operator fails to make payments (26 U.S.C. 9501(d)(1)). If the responsible operator fails to make payments, a lien on the operator's property is created in favor of the government. 30 U.S.C. 934(b)(2).

nate the constitutional question arising from their reading of the statute. Their interpretation would only change the constitutional question from whether Congress could impose liability on individual coal mine operators for disabilities unrelated to coal mining to whether Congress could impose such liability on the industry as a whole through an industry-financed trust fund. That latter question would require this Court to consider the continuing vitality of *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 334 (1935) (invalidating a law requiring an industry-financed trust fund, administered by the government, to pay pensions to former railroad employees).

For these reasons and the reasons stated in our opening brief, the judgment of the Third Circuit in No. 89-1714 should be affirmed, and the judgments of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor
Department of Labor

FEBRUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20376

Nos. 89-1714, 90-113 and 90-114

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

---

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE SUBMITTED IN SUPPORT OF THE MINE OPERATORS

MICHAEL CAMILLERI
Counsel of Record
LISA MURPHY
NATIONAL COUNCIL ON COMPENSATION INSURANCE
750 Park of Commerce Drive
Boca Raton, Florida 33487
(407) 997-4700

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	2
ARGUMENT	3
A. Introduction	3
B. The Black Lung Insurance Program	4
C. DOL's Rebuttal Rules Are Valid	7
D. Special Insurance Industry Concerns	13
E. There is a Significant Constitutional Problem Presented	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) 10

Broyles v. Director, Office of Workers' Compensation Programs, 824 F.2d 327 (4th Cir. 1987), *aff'd in part, Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) 12

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1987) 8

Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990) 4

DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 108 S. Ct. 1392 (1988) 16

Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975) 12

Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983) 13

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 17

Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987) 4,10,16

NLRB v. United Food & Commercial Workers' Union, 484 U.S. 112 (1987) 8

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 10,11,12,13,17

Pyro Mining Co. v. Slaton, 879 F.2d 187 (6th Cir. 1989) 3

Taylor v. Clinchfield Coal Co., 895 F.2d 178 (4th Cir. 1990) 3,8

Tazco, Inc. v. Director, Office of Workers' Compensation Programs, 895 F.2d 949 (4th Cir. 1990) 3

Table of Authorities Continued

Page

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 16,17

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V 16,17

STATUTES AND REGULATIONS:

7 U.S.C. § 1503 (1988) 15

26 U.S.C. § 4121 (1988) 3,14

26 U.S.C. § 9501 (1988) 14

26 U.S.C. § 9501(d) (1988) 3,14

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988) 2

Section 401(a), 30 U.S.C. § 901(a) (1988) 9,16

Section 402(b), 30 U.S.C. § 902(b) (1988) 11

Section 402(f), 30 U.S.C. § 902(f) (1988) 9

Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A) (1988) 9

Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988) ... *passim*

Section 413(b), 30 U.S.C. § 923(b) (1988) 10

Section 422, 30 U.S.C. § 932 (1988) 9

Section 422(a), 30 U.S.C. § 932(a) (1988) 4

Section 422(c), 30 U.S.C. § 932(c) (1988) 9

Section 422(j)(1), 30 U.S.C. § 932(j)(1) (1988) 3

Section 423, 30 U.S.C. § 933 (1988) 13

Section 423(a), 30 U.S.C. § 933(a) (1988) 5,9

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) 14

Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) 14

30 U.S.C. § 1257(f) (1988) 15

Table of Authorities Continued

	Page
Longshore Act, as amended, 33 U.S.C. §§ 901-950 (1988)	
Section 28, 33 U.S.C. § 928 (1988)	4
Section 32, 33 U.S.C. § 932 (1988)	15
33 U.S.C. § 1321(d) (1988)	15
33 U.S.C. § 1321(p) (1988)	15
41 U.S.C. § 351 (1982)	15
42 U.S.C. § 2210 (1982)	15
42 U.S.C. § 5154 (1982)	15
42 U.S.C. § 5172 (1982)	15
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)	14
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 312, 313 (1986)	14
Rules of the Supreme Court, Rule 37.3	2
14 C.F.R. Part 205 (1987)	15
Social Security Administration Regulations	
20 C.F.R. § 410.412(a)(1) (1990)	12
20 C.F.R. § 410.416 (1990)	11
20 C.F.R. § 410.426 (1990)	12
20 C.F.R. § 410.426(a) (1990)	12
20 C.F.R. § 410.450 (1990)	12
20 C.F.R. § 410.456 (1990)	11
20 C.F.R. § 410.490 (1990)	12
20 C.F.R. § 410.490(b) (1990)	8
20 C.F.R. § 410.490(b)(1) (1990)	11
20 C.F.R. § 410.490(b)(2) (1990)	11
20 C.F.R. § 410.490(c) (1990)	8
20 C.F.R. § 410.490(c)(2) (1990)	12
Department of Labor Regulations	
20 C.F.R. § 718.2 (1990)	4

Table of Authorities Continued

	Page
20 C.F.R. § 725.360(a)(4) (1990)	3
20 C.F.R. § 725.503 (1990)	4
20 C.F.R. § 725.608 (1990)	4
20 C.F.R. § 725.701 (1990)	4
20 C.F.R. Part 726 (1990)	2
20 C.F.R. § 726.203 (1990)	6,13,16
20 C.F.R. § 726.203(a) (1990)	9
20 C.F.R. § 726.203(c) (1990)	6
20 C.F.R. § 727.203 (1990)	4,7,14
20 C.F.R. § 727.203(a) (1990)	8
20 C.F.R. § 727.203(a)(3) (1990)	8
20 C.F.R. § 727.203(b)(3) (1990)	8,10,12,17,18
20 C.F.R. § 727.203(b)(4) (1990)	8,10,17
46 C.F.R. § 540.20 (1987)	15
LEGISLATIVE MATERIALS:	
Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (1976)	13
H.R. Rep. No. 864, 95th Cong., 2d Sess. (1978)	11
H.R. Rep. No. 1410, 96th Cong., 2d Sess. (1980)	14
House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. (Comm. Print 1981)	14
MISCELLANEOUS:	
National Coal Ass'n, *Facts About Coal 1990* (1990)	5
National Council on Compensation Insurance, *Issues Report, 1989* (1989)	6
U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* (1981)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1714, 90-113 and 90-114

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE SUBMITTED IN SUPPORT OF THE MINE OPERATORS

The National Council on Compensation Insurance submits this Brief Amicus Curiae[1] to respectfully request the reversal of the decisions of the United States Court of Appeals for the Fourth Circuit in Nos. 90-113 and 90-114, and the affirmance of the decision of the United States Court of Appeals for the Third Circuit in No. 89-1714.

INTEREST OF AMICI

The National Council on Compensation Insurance ("NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes more than 750 insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout most of the United States. In thirty-two states, including most major coal mining states, NCCI collects data and develops premium rates and rating plans for workers' compensation insurance. NCCI also manages various workers' compensation assigned risk plans and the National Workers' Compensation Reinsurance Pool (the "Pool"). Pool members reinsure among themselves several categories of risk that arise under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 (1988) (the "Act"). In particular, the Pool is the only commercial vehicle available to small or high-risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1990), or to purchase direct coverage from a state fund or insurance carrier. Most of NCCI's members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, 15% to 20% of all federal claim liabilities are insured or reinsured by the Pool. Approximately 50% of

[1] In accordance with Rule 37.3, the written consents of all parties are submitted herewith.

federal black lung liabilities that may be allocated to an individual mine owner are commercially insured.[2] The companies and competitive state insurance funds represented by NCCI account for more than 90% of the premium dollar volume of all insured U.S. workers' compensation coverages, including those available under the federal black lung program.

In federal black lung claims, the insurer is a party to the litigation and, as such, participates directly on behalf of its insured. 20 C.F.R. § 725.360(a)(4); *Tazco, Inc. v. Director, Office of Workers' Compensation Programs*, 895 F.2d 949, 952-53 (4th Cir. 1990). In this capacity, the insurance carrier hires defense counsel and bears the costs of litigation and administration. *Id.* A workers' compensation insurance policy including coverage for the federal black lung risk effectively transfers to the carrier all of the rights and obligations of the insured mine operator. *See Pyro Mining Co. v. Slaton*, 879 F.2d 187 (6th Cir. 1989). If benefits are awarded in an insured claim, they are paid by the carrier.

NCCI and its members have a direct, immediate and substantial interest in the outcome of this litigation.

ARGUMENT

A. Introduction

It is the purpose of this Brief Amicus Curiae to convey to this Court the special concerns of the workers' compensation insurance industry arising as a result of the decisions of the United States Court of Appeals for the Fourth Circuit in *Taylor v. Clinchfield Coal Co.*, 895 F.2d

[2] Liability arising out of claims in which the miner was last employed prior to January 1, 1970, and certain uninsured liabilities are paid by the Black Lung Disability Trust Fund. 26 U.S.C. § 9501(d), *incorporated by reference into* 30 U.S.C. § 932(j)(1). The Trust Fund is financed by a producer tax on coal. 26 U.S.C. § 4121.

178 (4th Cir. 1990), and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990). Wholly apart from the reasoning and authorities upon which these decisions are based, the results they mandate are intolerable and senseless. In both of these cases, the coal miner who filed a claim for benefits under the Act did not have any occupationally related disease or disability. The court below deemed these facts irrelevant and effectively mandated a workers' compensation award in both cases. The Fourth Circuit's holding affects not only these two cases, but thousands of additional still pending claims for benefits that were originally filed prior to April 1, 1980.[3] If these decisions are affirmed, substantial benefits[4] will be awarded on account of total disability or death due to black lung disease, even if the mine operator or carrier conclusively proves that the miner did not have the disease, did not suffer any disability due to the disease or did not die due to it. Congress surely did not intend this result.

B. The Black Lung Insurance Program

It is not necessary to burden the Court with another history of the Act or the interim presumptions, or to attempt to explore the intricacies of the rules and statutory

---

[3] The claims of Taylor and Dayton were adjudicated under the Department of Labor "interim" eligibility rules. 20 C.F.R. § 727.203 (1990). The interim rules were superseded by permanent eligibility regulations published by the Department that became effective on April 1, 1980. 20 C.F.R. § 718.2; *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 139 (1987).

[4] Benefits are typically payable retroactive to the date the claim was originally filed unless the proof establishes a specific month of onset of disability. In a survivor's claim, benefits are payable retroactive to the month of the miner's death. 20 C.F.R. § 725.503 (1990). Post-judgment interest on past due benefits is included in all awards, *id.* § 725.608, as are certain medical treatment benefits, *id.* § 725.701. An employee or carrier that has elected to defend a claim is also required to pay the claimant's attorney's fee if an award is made. 33 U.S.C. § 928, *incorporated by reference into* 30 U.S.C. § 932(a).

provisions involved. The parties will surely cover those points in detail. The contribution the insurance industry can make to the discussion lies in an explanation of how black lung insurance works, with the hope of demonstrating that Congress would not have and did not sanction the result reached by the court below.

Insurance carriers called upon to underwrite the federal black lung risk have always faced difficult challenges. The coal industry, unlike some other major industrial sectors of the economy, is composed of thousands of mostly small producers.[5] Most of these companies would have no financial ability to pay or even defend a single claim, the cost of which averages from $118,315.88 for a claimant without dependents to $185,659.69 for a married miner. Costs can go much higher. The costs of litigation and administration of claims are not included in these data. *See* U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981).

Workers' compensation insurance, unlike most commercial lines, cannot limit the maximum liability of the carrier. If a carrier offers workers' compensation coverage, it must provide full coverage for the insured employer's statutory workers' compensation liability, come what may, in order for the employer to comply with mandatory insurance requirements imposed by state workers' compensation laws.[6]

---

[5] In 1989, approximately 55.6% of U.S. coal tonnage produced was mined by the thirty largest operators. *See* National Coal Ass'n, *Facts About Coal 1990* 15 (1990). During the period from 1980-1989, the number of operating coal mines in the United States varied from 3337 to 4424. *Id.* at 16.

[6] State insurance officials regulate insurance premium rates and policy provisions. In workers' compensation lines of coverage, the carrier must provide full coverage for all insured employers. The Act contemplates the regulation of rates and coverages for the federal program by state agencies. 30 U.S.C. § 933(a). A premium charged for a policy covering the federal black lung risk must be approved by the appropriate state agency. The Department of Labor has no authority to regulate premium rates.

Under laws regulating the business of insurance, retroactive adjustment of workers' compensation premium rates to cover losses generated by the insurance carriers' miscalculations of the cost of a risk is impossible. The entire estimated cost of insuring a risk is fixed at the time a policy is sold and, when an occupational disease claim is filed, it attaches to the policy in effect on the date of the workers' last employment. *See* 20 C.F.R. § 726.203.[7] Premiums collected for that policy must cover all claims attributable to that policy. Premiums charged for policies in future years are not and cannot be calculated to pay the cost of previously incurred claims. In the black lung context, all the premium dollars that ever will be collected for the federal risk produced by claims filed prior to April 1, 1980, have already been charged and paid, and cannot be supplemented. The reasonable pricing assumptions made then, more than a decade ago, are irrevocable.

For these reasons, workers' compensation insurance premium ratemaking has evolved into an exacting science. Predictability, affordability, and a careful evaluation of potential risks are critical features of this very complex process. Pooling arrangements, like the National Workers' Compensation Reinsurance Pool, are essential to accommodate otherwise uninsurable employers.[8] To avoid catastrophic unfunded losses, industry specialists devote great care to reach an understanding of the nature of the risk to be insured. Sometimes errors are made, and the carriers

[7] If the miner was last employed before January 1, 1974, the effective date of the Department of Labor's program, the claim attaches to the policy in effect on the date the claim is first filed against the insured. 20 C.F.R. § 726.203(c).

[8] The pools have not shown an operating profit in the last decade and between 1984 and 1988 were subsidized by other markets for losses exceeding $4.4 billion. Rate increases adequate to cover these losses would simply not be affordable. NCCI, *Issues Report 1989* at 2-9 (1989).

and pools are answerable when that occurs.[9] That is to be expected, and is simply a reality of the insurance business.

The decisions below suggest, however, that the industry did not just make a terrible mistake in relying on the plain language of the Act and the Department of Labor's ("DOL") interim eligibility presumption, 20 C.F.R. § 727.203, but that it was the victim of an amazing deception. Although the DOL presumption and the Act clearly limit the risk to total disability or death due in part to pneumoconiosis, the Fourth Circuit now informs us that by virtue of 30 U.S.C. § 902(f)(2), the Act is not a workers' compensation act at all. Rather, it mandates compensation for coal miners and their families on account of old age, retirement, disabilities whatever their cause, and death. The workers' compensation insurance industry wrote no policies, collected no premiums and had no basis on which to ascertain that, in writing a limited workers' compensation insurance policy covering mine owners whose employees contracted disabling black lung disease, it was really insuring the life and health of all coal miners. The industry was not asked to, did not, and would not have insured this risk. There is, in fact, no generally available unified insurance product in this country that could be purchased for a risk of these dimensions.

From NCCI's perspective, it surely was the Fourth Circuit and not DOL which missed the point.

C. DOL's Rebuttal Rules Are Valid

The central question presented in these cases concerns the validity of DOL's third and fourth rebuttal methods in light of section 402(f)(2) of the Act. 30 U.S.C. § 902(f)(2). Section 402(f)(2) provides that in the category of claims that are at issue, the eligibility criteria applied in their adjudication shall not be more restrictive than the criteria

[9] If errors are made in favor of the insurance industry, future rate calculations usually must reflect an appropriate adjustment.

applied by the Social Security Administration ("SSA") prior to July 1, 1973. DOL's third method allows the denial of a claim in which the section 727.203(a) presumption is invoked if: "The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3). The fourth method allows rebuttal if: "The evidence establishes that the miner does not, or did not, have pneumoconiosis." *Id.* § 727.203(b)(4). SSA's interim presumption rebuttal criteria do not expressly provide for rebuttal by these methods. *Id.* § 410.490(c). The Fourth Circuit struck down DOL's rules for this reason.[10]

The interpretations of the Act reflected in DOL's additional rebuttal regulations must be sustained on judicial review if they are consistent with the Act and reasonable. *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 123 (1987). In applying this standard, this Court looks first to the plain language of the Act, and the inquiry ends if that language is reasonably clear. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1987). If the statutory mandate does not address the precise question presented, this Court defers to the agency's approach if it reflects "a permissible construction of the statute." *Id.*

In the regulatory setting presented, the question is whether the Act authorizes DOL's adjudicators to inquire into the existence of pneumoconiosis and related total dis-

[10] In *Taylor v. Clinchfield*, the court below also held that the less restrictive SSA rebuttal rules applied in a case in which the claimant invoked the DOL presumption on the basis of arterial blood gas tests. 895 F.2d at 182. This holding does not follow from the text of the rules or the Act. SSA's criteria contain no blood gas based interim presumptions. DOL added this invocation method in 20 C.F.R. § 727.203(a)(3). *Compare id.* with *id.* § 410.490(b). Section 402(f)(2) of the Act would not, therefore, proscribe any reasonable rebuttal criteria adopted by DOL, where the blood gas presumption alone is invoked. The Fourth Circuit was clearly wrong in its treatment of *Taylor*.

ability or death after the claimant has obtained presumptive entitlement. We submit it is difficult to read the Act to put these central issues out of bounds in any entitlement determination. The Act provides benefits *only* on account of total disability or death due to occupationally related pneumoconiosis. 30 U.S.C. § 901(a). The Act prohibits the assignment of liability to any mine operator unless the operator was, at least in part, responsible for causing total disability or death due to pneumoconiosis. 30 U.S.C. § 932(c). The definition of "total disability" and the instructions listing the essential components of that definition in section 402(f) of the Act, 30 U.S.C. § 902(f), plainly provide that the only kind of total disability the agencies are authorized to address in their regulations is total disability related to pneumoconiosis. 30 U.S.C. § 902(f)(1)(A). The only type of insurance contract a mine operator is required to purchase is one which guarantees the payment of benefits on account of total disability or death due to pneumoconiosis. 30 U.S.C. § 933(a), *referencing* 30 U.S.C. § 932.[11] Finally, the Act's requirement that all relevant evidence be considered in the adjudication of claims, making mention of many of the particular types of evidence that are relevant in determining whether the miner had or was seriously disabled by pneumoconiosis, does not per-

[11] It is not unimportant that DOL's insurance regulations prescribe an endorsement that must be attached to every commercial insurance policy sold to cover the federal risk. The black lung endorsement, which is a part of almost every federal black lung insurance policy ever sold, triggers the policy only if the claim against the policy is established "by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period. . . . " 20 C.F.R. § 726.203(a). There is some question whether there can be any coverage under this endorsement if the miner does not have the disease, and exposure has caused no injury. While the absence of adequate insurance would not release the operator from liability, the insurance contract might release the carrier from its obligation to pay claims on benalf of the operator. NCCI is not aware of any instance in which this policy defense has been raised, but it is certainly a possibility.

mit an adjudication in which evidence that is germane to these issues is simply ignored. *See* 30 U.S.C. § 923(b); *Mullins Coal Co.*, 484 U.S. at 49-50.

It does not seem likely that the reference to SSA's "criteria" in section 402(f)(2) was intended to repeal so many of the Act's specific provisions, or require a construction of them that deprives their plain words of ordinary meaning. As a general rule, these related provisions of a statute should be construed harmoniously. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 614-17 (1944). The Act directed the Secretary of Labor to write regulations assigning liability to mine operators and their insurers when a coal mine employee of the operator suffered total disability or death due to pneumoconiosis. The Secretary wrote such rules and was required to include among the rules provisions like those in 20 C.F.R. § 727.203(b)(3), (4). This should be enough to sustain the validity of these rules.

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988), suggests that a review of SSA's "criteria" is required before bringing the question to closure. Perhaps that is true, but the question decided in *Pittston Coal Group* was much simpler than the questions presented here. The offending criterion in DOL's presumption examined in *Pittston Coal Group* related only to the methods available for obtaining presumptive entitlement in the case of a miner who had not worked in the industry for at least ten years. SSA allowed presumptive entitlement under its interim presumption if the claimant established pneumoconiosis by x-ray, biopsy, or autopsy evidence and had ten years of employment or otherwise proved the connection between the test findings and coal mining exposure. By not allowing the shorter-term miner equivalent access to the presumption, DOL wrote a more restrictive rule. *Pittston Coal Group*, 488 U.S. at 119.

The Act, apart from section 402(f)(2), was, according to this Court, silent on the precise question presented in *Pittston Coal Group*. That is not the case here. The Act is not silent. It clearly mandates the consideration of whether the miner has pneumoconiosis, is totally disabled by it or died due to pneumoconiosis as an absolute prerequisite to eligibility and liability. The Secretary of Labor ensured that these matters would be appropriately considered in the adjudication of individual claims, in accordance with the unambiguous mandate of the Act. The challenged rules are valid for this reason.[12] The word "criteria" must be construed in keeping with the statute as a whole.

A thorough examination of SSA's criteria does not detract from the conclusion compelled by the Act. The examination reveals mostly that SSA was not very careful in drafting its regulations. It is, nevertheless, reasonably clear that SSA required the claimant to prove the existence of pneumoconiosis *before* its interim presumption could be invoked. That is, once the claimant met the medical criteria of 20 C.F.R. § 410.490(b)(1), it still had to be proven that the (b)(1) evidence demonstrated a condition arising out of coal mine employment. 20 C.F.R. § 410.490(b)(2), *incorporating by reference id.* §§ 410.416, 410.456. As a statutory matter, a medical finding is not a finding of pneumoconiosis unless the condition found is a disease or impairment arising out of coal mine employment. 30 U.S.C. § 902(b). Since SSA's rule requires inquiry into whether the health impairment triggering section 410.490(b)(1) also arose out of coal mine employment, it, like DOL's presumption, directs the adjudicator to determine whether the miner has pneumoconiosis in every case. DOL conducts

---

[12] There is nothing in the legislative history to indicate a contrary intention, and it appears that Congress made a special effort to impress upon the Secretary of Labor the need to write regulations ensuring the thorough and complete litigation of cases. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309.

this inquiry after the burden of persuasion shifts to the operator, but DOL's rule on this account is not more restrictive than SSA's.

The other DOL rebuttal rule invalidated by the court below permits a factual inquiry into whether the miner's disability or death was caused by his occupational disease. 20 C.F.R. § 727.203(b)(3). DOL permits an award if the disease contributes, in whole or in part, to the total disability or death. *Id.* SSA's disability causation standard is in 20 C.F.R. § 410.426(a) and it is a "primary reason" standard. While the primary reason standard is not stated in section 410.490's rebuttal provisions, it is cross-referenced. 20 C.F.R. § 410.490(c)(2), *incorporating by reference id.* § 410.412(a)(1), *incorporating by reference id.* § 410.426. SSA's death causation standard is at 20 C.F.R. § 410.450 and it is simply a "death due to" rule. It is not cross-referenced, but it could be construed to apply in this very complex scheme. *See Farmer v. Weinberger*, 519 F.2d 627 (6th Cir. 1975).

In sum, SSA's criteria fail to compel the conclusion that they preclude the fact inquiries prescribed in DOL's third and fourth rebuttal rules. The same type of cross-referencing exercise that revealed the invalidity of DOL's ten-year rule in *Pittston Coal Group* demonstrates the validity of DOL's rebuttal rules. If there is ambiguity here, DOL did not exceed the bounds of "permissible" in conforming SSA's confusing scheme to the clear requirements of the Act.[13]

---

[13] In an amici curiae brief filed by the insurance industry in *Pittston Coal Group*, the industry accepted the holdings of several courts of appeals stating that the SSA interim presumption, once invoked by x-ray, biopsy, autopsy or ventilatory test evidence could be rebutted only if it was proven that the miner was working or able to work. In these decisions, the existence of pneumoconiosis or a link between the disease and total disability was not relevant in determining entitlement. *See e.g., Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part, Pittston Coal Group*, 488 U.S. at 121; *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 283 (6th Cir. 1983). The decision in *Pittston Coal Group* focused attention more closely on the precise words of SSA's criteria leading now to the conclusion that they fairly clearly do not state what the courts of appeals had believed. There is no indication that SSA itself advocated the views of the *Haywood* court, for example, and the argument presented here by NCCI is refined accordingly.

D. Special Insurance Industry Concerns

Beyond the traditional legal arguments, the workers' compensation insurance industry's perspective on the principles presented in this case make it difficult to accept the theory reflected in the decisions below. Congress harbored no intent to lure the industry into writing insurance coverage for an uninsurable risk. Total disability or death due to occupational pneumoconiosis is an understandable and insurable risk. A workers' compensation program masquerading as an unemployment, general disability, retirement or life insurance program for coal miners, is not. The history of the insurance industry's involvement demonstrates Congress's special concern for insurability and strongly supports DOL's understanding that in designing section 727.203, the agency was required to preserve fairness for the private parties involved.

Mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, but the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by the Department of Labor and asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[14] Given repeated assurances by the Department and Congress during the period from 1973 to the present day that the black lung claims process would,

---

[14] *Hearings on H.R. 10760 and S. 8183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, the insurance industry provided coverage at affordable rates.

Following liberalizations of entitlement rules in the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and largely because of the retroactive application of section 727.203 to previously filed claims, it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the insurance industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[15] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong.,1st Sess. 16, 30 (Comm. Print 1981); *see also* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing . . . this retroactive liability. . . . [T]he combined effect of the 1977 law requiring the au-

[15] This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (c), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 26 U.S.C. § 9501(d). The Fund is currently more than $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

tomatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The partnership between Congress, many federal agencies and the commercial liability insurance industry is pervasive. This industry is called upon frequently to assist Congress in the implementation of national policies by providing private parties the insurance coverage they need to be in compliance with federal laws.[16] In order for this partnership to be maintained, there must be an acceptable level of predictability and stability in the risks Congress creates. The partnership cannot survive if the industry is considered merely an adjunct to the Federal Treasury. Private insurance cannot fund entitlements that are subject to the changing whims of Congress. The financial structure of the industry is simply not designed to and cannot respond to endless retrospective tinkering with liability concepts. NCCI believes that Congress is well aware of this fact. It is unimaginable that Congress would, in the black lung program, ask the insurance industry to fund a compensation scheme for previously filed claims based on the Fourth Circuit's reading of 30 U.S.C. § 902(f)(2). It is equally improbable that Congress would do so without clearly expressing such intent.

When Congress liberalized the Act in 1978, most of the claims here in question were already insured under preex-

[16] Just a few examples are the Longshore Act, 33 U.S.C. § 932; the Price-Anderson Act, 42 U.S.C. § 2210 (nuclear plant accidents); 42 U.S.C. §§ 5154, 5172 (nuclear disaster relief); 7 U.S.C. § 1503 (crop insurance); 33 U.S.C. § 1321(d), (p) (maritime disasters); 30 U.S.C. § 1257(f) (surface coal mining operations); 41 U.S.C. § 351 (government contractors); 46 C.F.R. § 540.20 (1987) (cruise ships); 14 C.F.R. Part 205 (1987) (air carriers). The industry is now working closely with Congress to develop insurance programs for earthquake related losses.

isting insurance policies. Those policies provided coverage only for total disability or death due to black lung disease and they cannot be rewritten. There is no proof that the 1978 amendments would rewrite these policies to require payment for unexpected and unknown risks wholly divorced from the stated purpose of the Black Lung Act. *See* 30 U.S.C. § 901(a) ("It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease. . . . ").

In sum, there are many sound reasons why the Secretary of Labor designed section 727.203 to ensure a fair opportunity to defend, not the least of which is that the benefit-funding mechanisms available and the rights of claim defendants required protection.

E. There is a Significant Constitutional Problem Presented

This Court will ordinarily construe a statute to avoid constitutional difficulty, if possible. *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 108 S. Ct. 1392, 1397 (1988). The Court may easily do so here. Section 402(f)(2) of the Act does not compel a construction that imposes black lung liability on an employer who caused no disease, disability or death. But if section 402(f)(2) imposes liability without any responsibility, the minimal rationality required by the Due Process Clause is hard to find. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The right to a fair hearing also guaranteed by the Due Process Claim is similarly elusive.

The proven facts by which either DOL's or SSA's interim presumption may be invoked give rise to, at very best, a weak inference of total disability or death due to pneumoconiosis. *See Mullins Coal Co.*, 484 U.S. at 143. In most instances the inference will not be justified at all, particularly where the invocation criteria were intentionally set so low, that no health impairment of any kind is really required to cause a burden of proof shift. *See Pittston Coal Group*, 488 U.S. at 138 n.8 (Stevens, J., dissenting) (quoting Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 7.

The due process test for determining the validity of civil presumptions requires a rational connection between "the fact proved and the ultimate fact presumed." *Usery*, 428 U.S. at 28. That essential connection cannot be demonstrated within the Fourth Circuit's reading of section 402(f)(2).

Moreover, "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The Fourth Circuit's holding prohibiting the defense from proving the key facts in most claims clearly exceeds the bounds of this important protection.

However it is done, Congress may not transfer property from one party to another, consistent with the Due Process Clause, unless there is a rational basis for doing so. In this country, *all* litigants are entitled to a fair hearing and to insist upon some valid reason justifying congressional disruption of their property rights. In the two cases decided by the Fourth Circuit that are being reviewed here, the mine operators are simply not responsible for causing any harm to the claimants. If it has any meaning left in a civil economic rights context, the Due Process Clause does not authorize this taking.

CONCLUSION

The decisions of the United States Court of Appeals for the Fourth Circuit invalidating 20 C.F.R. § 727.203(b)(3) and (4) should be reversed. The decision of the United

States Court of Appeals for the Third Circuit upholding section 727.203(b)(3) should be affirmed.

Respectfully submitted,

MICHAEL CAMILLERI
Counsel of Record
LISA MURPHY
NATIONAL COUNCIL ON
COMPENSATION INSURANCE
750 Park of Commerce Drive
Boca Raton, Florida 33487
(407) 997-4700

(10) (8) (8)

Nos. 89-1714, 90-113 and 90-114

FILED
DEC 13 1990
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

Harriet Pauley, Survivor of John C. Pauley, *Petitioner*,

v.

Bethenergy Mines, Inc., *et al.*, *Respondents*.

Clinchfield Coal Company, *Petitioners*,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

Consolidation Coal Company, *Petitioners*,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

William E. Hynan
(Counsel of Record)
Peter A. Gabauer, Jr.
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652

Counsel for Amicus Curiae
National Coal Association

December 1990

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

INTEREST OF AMICI 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. The Department of Labor's Interim Presumption Rebuttal Provisions Conform to the Purpose and Language of the Black Lung Benefits Act 7

A. The Department of Labor Provisions Reflect Congressional Intent 7

B. The Fourth Circuit's Decisions Below are Contrary to the Black Lung Benefits Act 10

C. The Fourth Circuit's Decisions are Contrary to this Court's Decision In Mullins Coal Co 11

D. If Sustained, the Fourth Circuit's Decisions Devastate Defense Rights and Raise Serious Constitutional Problems 13

II. Pittston Coal Group Does Not Compel the Invalidation of DOL's Rebuttal Regulations 15

III. The Court Should Not Resolve This Litigation by Dumping Liability on the Trust Fund 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).....11

Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989), *cert. granted sub nom. Pauley v. Bethenergy Mines Inc.*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 89-1714).....2, 10

County Court of Ulster Cty v. Allen, 442 U.S. 140, 156 (1979).....13

Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990).....2, 13, 15

Director, Office of Workers' Compensation Programs v. Black Diamond Mining Coal Co., 598 F.2d 945 (5th Cir. 1979).....18

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981).....16

Mobile, Jackson & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910).....13

Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987).....*passim*

Pittston Coal Group v. Sebben, 484 U.S. 105 (1988).....1, 6, 15, 16

Republic Steel Corp. v. U.S. Dep't of Labor, 590 F.2d 77 (3d Cir. 1978).....18

Page

Richards v. United States, 369 U.S. 1 (1962).....16

Taylor v. Clinchfield Coal Co., 895 F.2d 178 (4th Cir. 1990).....2, 14, 15

Taylor v. Peabody Coal Co., 892 F.2d 503, 506 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696)....15

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).....13, 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V.....6, 13, 14

STATUTES AND REGULATIONS:

26 U.S.C. § 4121 (1988).....3

26 U.S.C. § 4121(a) (1988).....4

26 U.S.C. § 4121(b) (1988).....4

26 U.S.C. § 4121(e)(2) (1988).....4

26 U.S.C. § 9501(a)(2) (1988).....3

26 U.S.C. § 9501(c) (1988).....4

26 U.S.C. § 9501(d)(1)(B) (1988).....3, 18

26 U.S.C. § 9501(d)(2) (1988).....3, 18

Page

26 U.S.C. § 9501(d)(4) (1988).....4

26 U.S.C. § 9501(d)(5) (1988).....3

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988).....*passim*
30 U.S.C. § 901(a) (1988).....2, 6, 10, 19
30 U.S.C. § 902(f)(1)(A) (1988).....10
30 U.S.C. § 902(f)(1)(D) (1988).....10
30 U.S.C. § 902(f)(2) (1988).....8, 15
30 U.S.C. § 921(a) (1988).....2
30 U.S.C. § 922 (1988).....10
30 U.S.C. § 923(b) (1988).....10, 11
30 U.S.C. §§ 931-945 (1988).....3
30 U.S.C. §§ 932 (1988).....3
30 U.S.C. § 932(a) (1988).....18
30 U.S.C. § 932(c) (1988).....10, 17, 18, 19
30 U.S.C. § 932(h) (1988).....10
30 U.S.C. § 933 (1988).....3
30 U.S.C. § 934 (1988).....3, 18
30 U.S.C. § 934(b)(1)(B) (1988).....19
30 U.S.C. § 945 (1988).....8
30 U.S.C. § 945(a)(2)(A) (1988).....9

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969).....7, 8

Black Lung Benefits Act of 1972, Pub. L. No. 95-239, 92 Stat. 95 (1978).....6, 8, 9, 10

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).....6, 8, 9

Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981).....4

Page

Consolidated C... Budget Reconciliation Act of 1985, Pu... 72, 13203, 100 Stat. 4, 5

Longsho... ...ers' Compen... ..., 33 U.S.C. §§ 901-950 (1988).....18

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, 101 Stat. 1330-446 (1987).....4

Rule 37.3, Rules of the United States Supreme Court.....3

Social Security Administration Regulations
20 C.F.R. § 410.412(a)(1) (1990).....15
20 C.F.R. § 410.424 (1990).....16
20 C.F.R. § 410.426 (1990).....16
20 C.F.R. § 410.426(a) (1990).....16
20 C.F.R. § 410.490 (1990) 15
20 C.F.R. § 410.490(a) (1990).....8
20 C.F.R. § 410.490(b) (1990).....8
20 C.F.R. § 410.490(c) (1990).....15, 16
20 C.F.R. § 410.490(c)(2) (1990).....15

Department of Labor Regulations
20 C.F.R. § 727.203 (1990).....*passim*

LEGISLATIVE MATERIALS:

Staff of Joint Comm. on Taxation, 99th Cong. 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* (Comm. Print 1985).....4

H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).....17

Page

S. Rep. No. 743, 92d Cong., 2d Sess. 18-19 (1972).....8

124 Cong. Rec. 2333 (1978)..... 8, 17

124 Cong. Rec. 3426 (1978).....17

124 Cong. Rec. 3431 (1978) 17

MISCELLANEOUS:

Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988*.....4

U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Dep't of Labor).....9

U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds (1990)*.....5

Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981).....14

Petition for Rehearing With Suggestion for Rehearing In Banc of Respondent, John C. Pauley, Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989).....17, 18

Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990).....4

Page

Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in a telephone interview with Bruce Watzman, NCA (Dec. 10, 1990).....5

Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor and information supplied by Robert K. Briscoe, Milliman & Robertson, Inc. in separate telephone interviews with Herve Levin, sole practitioner, Dallas Tex. and consultant to Milliman & Robertson, Inc., Consulting Actuaries, N.Y., N.Y. (April 27, 1990).....5

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

Nos. 89-1714, 90-113 and 90-114

Harriet Pauley, Survivor of John C. Pauley, *Petitioner*,
v.
Bethenergy Mines, Inc., *et al.*, *Respondents*.

Clinchfield Coal Company, *Petitioners*,
v.
Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

Consolidation Coal Company, *Petitioners*,
v.
Director, Office of Workers' Compensation Programs, United States Department of Labor, *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

For the third time[1] in four years, this Court is being asked to preserve the basic right of mine operators to defend themselves in claims under the Black Lung Benefits Act. 30

[1] *Mullins Coal Co., Inc. of Virginia v. Director*, OWCP, 484 U.S. 135 (1987) ("*Mullins*") and *Pittston Coal Group v. Sebben*, 484 U.S. 105 (1988) ("*Pittston Coal Group*").

U.S.C. §§ 901-945 (1988) ("the Act" or "BLBA"). This time, the question squarely presented is whether a miner who is able to obtain presumptive entitlement must be awarded benefits whether or not he has black lung disease (*i.e.*, pneumoconiosis) or is totally disabled by the disease.

The Act provides benefits to miners who are "totally disabled due to pneumoconiosis." 30 U.S.C. § 901(a). In *Mullins*, this Court described the elements necessary for an award of benefits under the Act: "Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins*, 484 U.S. at 141. *See also* 30 U.S.C. § 921(a).

This time the Court is presented with two Fourth Circuit Court decisions[2] which interpret regulations under the Act to provide that a claimant who is statutorily barred from recovery may nevertheless recover benefits. The Fourth Circuit achieves this incredible result by vitiating virtually all rebuttal rights under the Act and compelling payment of benefits where all the relevant medical evidence clearly shows that the miner does not have black lung disease.

Negating defense rights, particularly to this degree, denies defendants fundamental fairness and due process, is contrary to the Act and to the view of this Court in *Mullins* that "all relevant evidence" must be admissible at some point during the proof process. *See, generally, Mullins*, 484 U.S. at 1149-51. These decisions should be overturned.

[2]*Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990); *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990); *Bethenergy Mines Inc. v. Director, OWCP*, 890 F.2d 1290 (3d Cir. 1989) ("*Bethenergy Mines*").

INTEREST OF AMICI[3]

The National Coal Association ("NCA") is a trade association representing coal mine operators who produce over sixty-one percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. §§ 931-945, in two direct ways: (1) as individual coal mine operator defendants,[4] 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF" or "Trust Fund"), 26 U.S.C. § 4121. Revenues collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(2), 9501(d)(1)(B). The BLDTF also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the

[3]Pursuant to Rule 37.3, written consents from counsel of record for all parties to these consolidated proceedings are being filed with the Clerk of this Court with this Brief.

[4]Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

The tax paid by coal producers into the BLDTF, augmented by two tax increases,[5] is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $5.66 billion in tonnage taxes from coal producers since 1978.[6] But the BLDTF has paid out over $8.64 billion in compensation since 1978.[7] In order to meet the shortfall between compensation levels and BLDTF revenues, the BLDTF has been augmented by appropriations from the general treasury. As a result, the BLDTF currently owes the U.S. Treasury

[5]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986) [hereinafter cited as 1986 Budget Reconciliation Act]. Congress provided that the 1981 tax increase was temporary, and that the producers' tax would revert to lower, 1978 rates by January 1, 1996, or when the BLDTF was no longer in debt to the U.S. Treasury for repayable advances or interest, whichever occurred first. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 102(a), 95 Stat. 1635 (1981); the 1986 Budget Reconciliation Act, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313. In 1987, the Administration proposed to increase the tax on producers yet a third time to raise $400 million in additional revenue. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* at 2-41. Congress refused, instead extending the 1996 date for reversion of the current tax to the lower 1978 rate until January 1, 2014. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), amending 26 U.S.C. § 4121(e)(2).

[6]Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor ("DOL"), in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990).

[7]*Id.*

nearly $3.05 billion.[8] To relieve pressure on the BLDTF, Congress in 1985 passed a 5-year moratorium on interest accruals on the indebtedness of the BLDTF. The moratorium ended September 30, 1990.[9] The present interest on the debt is $1,032,850.[10] The additional interest on the debt in fiscal year 1991 is estimated to be $328 million.[11]

The three decisions before this Court, will have a dramatic impact on the coal industry.

Unless reversed, the decisions of the Fourth Circuit will force the coal industry, directly or indirectly, to accept liability for thousands of claims for which Congress did not intend the industry to be liable.[12]

The unreasonable increase of unanticipated and unfunded liability which will result if these cases are not reversed will come at a time when the American coal industry can ill afford it. NCA members are therefore critically interested in this Court's resolution of the important issues presented by these consolidated cases.

[8]U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 1990) (available through the U.S. Dep't of the Treasury).

[9]1986 Budget Reconciliation Act, Pub.L. No. 99-272, § 13203(b) 100 Stat. 312.

[10]Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in a telephone interview with Bruce Watzman, NCA (Dec. 10, 1990).

[11]*Id.*

[12]Industry actuaries and the government view the present value of federal black lung claims at $1.5 billion dollars per 10,000 awarded claims. Information supplied by Robert K. Briscoe, Milliman & Robertson, Inc., Consulting Actuaries, N.Y., N.Y. and James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor in separate telephone interviews with Herve Levin, sole practitioner, Dallas, Tex. and consultant to Milliman & Robertson, Inc., Consulting Actuaries (Apr. 27, 1990).

SUMMARY OF ARGUMENT

Department of Labor rebuttal rules reflect clear Congressional intent that "all relevant medical evidence" be considered at some point in the proof process. DOL regulations achieve the liberality to miners Congress sought in the 1977 amendments to the Black Lung Benefits Act but also preserve employer rights to meaningful defenses against non-meritorious claims by requiring consideration of medical evidence in adjudications of black lung benefit claims, reflecting Congress's intent that DOL preserve the basic integrity of the black lung programs by requiring a finding of the presence of black lung disease.

The Act's sole purpose is to provide benefits on account of total disability or death due to pneumoconiosis. 30 U..S.C. § 901(a). Fourth Circuit decisions before this Court eliminate an operator's right to contest on rebuttal whether a miner, in fact, has pneumoconiosis. As a result, the Fourth Circuit has held benefits can be awarded in DOL interim presumption claims to a miner who not only is not totally disabled due to pneumoconiosis but doesn't even have the disease. The Fourth Circuit's position contradicts Congress's mandate, misconstrues the Social Security rebuttal provisions, is contrary to this Court's decision in *Mullins Coal Co. Inc. of Virginia V. Director OWCP*, and results in liabliity to private parties without due process of law.

This Court's decision in *Pittston Coal Group v. Sebben* does not compel invalidation's of DOL's rules. This Court expressly declined to rule on DOL's rebuttal rules in that case. Unlike in *Pittston Coal Group*, DOL's rebuttal rules are not more restrictive than SSA's rebuttal provisions. Finally, neither the Act nor its legislative history supports the idea that miners have more rights when the Trust Fund, rather than an employer is the defendant.

ARGUMENT

I.

THE DEPARTMENT OF LABOR'S INTERIM PRESUMPTION REBUTTAL PROVISIONS CONFORM TO THE PURPOSE AND LANGUAGE OF THE BLACK LUNG BENEFITS ACT

A. The DOL Rebuttal Provisions Reflect Congressional Intent

Title IV of the Federal Coal Mine Health & Safety Act of 1969[13] is divided into two parts, Part B and Part C. Part B deals with claims filed on or before June 30, 1973, and is funded by general federal revenues. The Social Security Administration ("SSA") was given the responsibility to administer Part B claims.[14] Part C deals with claims filed after that time. Awards under Part C are the responsibility of mine operators. DOL was chosen to administer Part C claims.[15]

The Secretary of Labor was not authorized to write regulations defining total disability under the BLBA until Congress amended the Act in 1977. Under the original Act, only the Secretary of Health, Education and Welfare was authorized to promulgate regulations for determining whether benefits should be paid under the program. Congress originally directed

---

[13]Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 411-426, 83 Stat. 792 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 823, 880-886 [hereinafter cited as the 1969 Act].

[14]The 1969 Act, *supra* note 13, at §§ 411-414. In 1972 Congress amended the Act and extended Part B to include claims filed on or before June 30, 1973. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5, § 7, 86 Stat. 155-157 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 183, 189, 190, 192 (amending the 1969 Act, Pub. L. No. 91-173, § 414 and adding a new § 415) (hereinafter cited as the 1972 amendments).

[15]The 1969 Act, *supra* note 13, at §§ 421-424.

that SSA's permanent regulations were to be applied in Part C claims.[16]

In response to Congressional concerns expressed during the development of the 1972 amendments to the Act, S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted* in 1972 U.S. Code Cong. & Ad. News 2322-23, about speeding up claims adjudication and enhancing the likelihood of approval notwithstanding a shortage of medical testing facilities in mining regions of the country, SSA promulgated a special interim presumption at 20 C.F.R. § 410.490(b). See 20 C.F.R. § 410.490(a) (1990). This presumption applied only to Part B claims. 20 C.F.R. § 410.490(b)(1990).

In the 1977 amendments to the Act,[17] Congress directed the Secretary of Labor to write his own regulations (in two sets) to be applied to reopened and newly filed Part C claims. These amendments specified, however, that in the rules for previously denied and pending claims subject to re-review by the 1977 legislation, such regulations must not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973. 30 U.S.C. §§ 902(f)(2), 945.

The Department of Labor responded with its interim presumption 20 C.F.R. § 727.203 (1990) that incorporated the medical criteria of the SSA interim presumption and, reflected congressional concern that the basic integrity of the program be preserved,[18] Labor's regulations also specifically mandated consideration of all relevant medical evidence, and preserved the employer's right to meaningful defenses against non-meritorious claims by requiring the consideration of scientific and medical evidence in the adjudication of black lung benefit claims.

[16]The 1969 Act, *supra* note 13, at § 422(h).

[17]Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) [hereinafter cited as the 1977 amendments].

[18]*See* 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits, conferee and sponsor):

I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung benefit

The Department of Labor's regulations achieved the liberality to miners that Congress sought. Armed with its new presumption, Labor approved at least 96,000 claims, well in excess of congressional projections.[19]

Although it is difficult to prevail unless a claim very clearly lacks merit, coal operator defendants have been able to successfully defend claims under DOL's presumption in large part by DOL's rebuttal provisions which legitimately focus the entitlement inquiry on the basic elements of a compensable claim.

claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding not only of the presence of black lung disease, but, also that the claimant's disability due to the disease prevents him from performing coal mine work.

. . . .

I . . . requested that the statement of managers include language to the effect that "*all relevant medical evidence*" be considered in applying the "interim" standards to the reviewed claims. . . .

[Emphasis added.]

[19]Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987). From 1978 to the present, at least, 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and referred to the Secretary of Labor for payment from the BLDTF, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF alone because of the 1977 amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

B. The Fourth Circuit's Decisions Below are Contrary to the Black Lung Benefits Act

The Act does not create a general welfare or general medical compensation program. Rather, the program is plainly restricted. The Act's sole purpose is to provide benefits to coal miners and their families on account of total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). The Fourth Circuit has held, however, that benefits can be awarded in DOL interim presumption claims to a miner who is not totally disabled due to pneumoconiosis or does not even have the disease. These holdings obviously violate the stated purpose of the Act.

As the Third Circuit has said, "even though the Benefits Act has a remedial purpose, it seems perfectly evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover." *Bethenergy Mines, Inc.*, 890 F.2d at 1300 (citation omitted). As the Third Circuit further observed, a holding which results in an award of benefits regardless of whether the law and facts require otherwise is "an unjust result." *Id.*

In the 1977 amendments when Congress authorized the Secretary of Labor to write eligibility regulations, it also emphasized that such regulations must be designed to compensate pneumoconiosis. 30 U.S.C. §§ 902(f)(1)(A), 902(f)(1)(D), 922; *see also*, 30 U.S.C. § 932(h) (requiring the Secretary of Labor "by regulation" to establish standards "which *may* include appropriate presumptions, for determining whether *pneumoconiosis* arose out of employment in a particular coal mine or mines"); 30 U.S.C. § 923(b) (requiring the trier-of-fact to consider all relevant evidence in determining the validity of a claim); 30 U.S.C. § 932(c) (providing that benefits shall not be charged to a mine operator for death or disability due to pneumoconiosis that did not arise, at least in part, out of

employment with that operator after December 31, 1969). [Emphasis added.]

There is nothing within the four corners of the Black Lung Benefits Act, or in its legislative history that supports the Fourth Circuit's decision to permit the award of benefits where it is proven that the miner does not have pneumoconiosis. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). The Black Lung Benefits Act is no exception to this rule.

C. The Fourth Circuit's Decisions are Contrary to this Court's Decision in Mullins Coal Co.

The Fourth Circuit's decisions prevent "all relevant medical evidence" from being considered at some point during the proof process. These decisions are clearly contrary to this Court's decision in *Mullins*. There, the Court noted:

> After the SSA adopted its interim presumption, its claims approval rate increased, in part due, it is thought, to factfinders failing to consider all of the employers' relevant medical evidence. *To assure that this problem would not infect adjudications under the new Labor interim presumption, the requirement of 30 U.S.C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section.* Thus, that the "all relevant medical evidence" requirement appears at the beginning of the rebuttal section reflects the genesis of the concern and does not indicate that the drafters intended a more limited evidentiary battle at the invocation stage. *As long as relevant evidence will be considered at some point by the ALJ, the demand that the decision be made on the complete record is satisfied.*

484 U.S. at 149-50 (footnote omitted, emphasis added).

This clear statement that all relevant medical evidence must "be considered at some point" in the proof process reflects this Court's clear reading of congressional intent:

> Rather than merely providing a benefit for those miners who could prove each of the relevant facts by a preponderance of the evidence, Congress intended that those long-term miners who can show that they are truly diseased should have to prove no more. ***But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits.*** For not only does that miner fall outside the class of those who need the assistance of an interim presumption, but he also is unlikely to be totally disabled from coal mine employment. By requiring miners to show that they suffer from the sort of medical impairment that initially gave rise to congressional concern, and then by requiring employers to shoulder the remainder of the proof burden, the Secretary's reading of the interim presumption's invocation burden satisfies both the purposes of the statute and the need for a logical connection between the proven fact and the presumed conclusion.

484 U.S. at 158-59 (footnote omitted).

Thus, in *Mullins*, this Court discussed in depth the Act's development and the requirements Congress set forth for the proof process in a case in which the Labor interim presumption is invoked. This Court clearly established a position contrary to that taken by the Fourth Circuit.

D. If Sustained, the Fourth Circuit's Decisions Devastate Defense Rights and Raise Serious Constitutional Problems

In *Mullins*, this Court identified the serious constitutional concerns "lurking beneath the surface" in the proof process in black lung cases. *Mullins Coal Co.*, 484 U.S. at 159 n. 32.

The Fourth Circuit's decisions raise these concerns to the surface. This Court has established a constitutional threshold for statutory presumptions. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) ("Usery"); *Mobile, Jackson, & K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1910) ("*Mobile, Jackson*"). It is settled that a rule of evidence which permits an ultimate fact to be "presumed" from proof of a predicate fact violates the due process clause if there is no rational connection between the fact shown and the ultimate fact presumed. Such a presumption violates the due process clause if it is so unreasonable as to be arbitrary or if it, "under guise of regulating the presentation of evidence operate[s] to preclude the party from the right to present his defense to the main fact thus presumed." *Mobile, Jackson*, 219 U.S. at 43. *See also Mullins*, 484 U.S. at 159. The validity of presumptions as evidentiary devices to resolve contested issues of fact depends on the strength of the connection between the facts proven and the facts presumed, "and on the degree to which the [evidentiary] device curtails the factfinder's freedom to assess the evidence independently." *County Court of Ulster Cty v. Allen*, 442 U.S. 140, 156 (1979). Labor's interim presumption, as interpreted by this Court, protects this basic principle. As interpreted by the Fourth Circuit, the basic principle is destroyed.

The Fourth Circuit in *Dayton v. Consolidation Coal Co.* held that a presumption of total disability due to coal workers' pneumoconiosis invoked by ventilatory test results cannot be

rebutted by proving the absence of black lung disease. This holding is constitutionally flawed, from a due process perspective, because there is no relationship between the fact proven (*i.e.*, ventilatory studies which satisfy a table) and the fact presumed (i.e., total disability due to coal workers' pneumoconiosis).[20]

The decision in *Taylor v. Clinchfield Coal Co.* produces the same generic result and is flawed in the same way.

A presumption of total disability due to black lung disease based on ventilatory test results or arterial blood gas studies would not be constitutionally suspect, if the factfinder could consider all relevant evidence and determine the existence of the presumed facts upon which a finding of entitlement is ultimately based. *See Mullins*, 484 U.S. at 149; *Usery*, 428 U.S. at 35-37. The Fourth Circuit's determination bars such an approach and clearly denies claims defendants due process of law. No matter how liberal the intent of the Black Lung Benefits Act, or how narrow the sweep of the Due Process Clause is in an economic rights setting, Congress may not require the transfer of money from one private party to another where the basis for requiring such transfer is proven not to exist.

[20]Ventilatory test values specified in the invocation portion of the DOL and SSA interim presumptions suggest neither a diagnosis of black lung disease nor, in the case of older miners, the existence of significant lung impairment. *See* Solomons *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880-83, 885-86, 899-900 (1981).

II.

PITTSTON COAL GROUP DOES NOT COMPEL THE INVALIDATION OF DOL'S REBUTTAL REGULATIONS

Several circuit courts of appeal have concluded that this Court's opinion in *Pittston Coal Group* compels the invalidation of DOL's rebuttal rules.[21] This is simply incorrect. This Court expressly declined to rule on DOL's rebuttal rules in *Pittston Coal Group* because claimants in the cases before the Court conceded the validity of those rules.[22] Moreover, the major problem caused by the interplay of DOL and SSA rules as defined in *Pittston Coal Group* is not present here.

The essential finding in *Pittston Coal Group* is that DOL's ten-year invocation rule is more restrictive than SSA's counterpart. As such, based on 30 U.S.C. § 902(f)(2), this Court ruled the DOL rule could not stand.[23] It is not clear that the same flaw infects the rebuttal side.

SSA's rebuttal provision, 20 C.F.R. § 410.490(c), does not specifically mention rebuttal by proof that pneumoconiosis is not present or did not contribute to a miner's disability or death; however, § 410.490 does clearly encompass consideration of whether pneumoconiosis was present or contributed to a miner's death or disability. SSA rebuttal rule, 20 C.F.R. § 410.490(c)(2), cross-references another SSA regulation, 20 C.F.R. § 410.412(a)(1) (part of the SSA definition of "total disability") which then cross-references still other SSA rules,

[21]In addition to the Fourth Circuit, the Seventh Circuit concluded that *Pittston Coal Group* required the invalidation of DOL's rebuttal rules. *Taylor v. Peabody Coal Co.*, 892 F.2d 503, 506 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-1696).

[22]488 U.S. at 119, 121.

[23]488 U.S. at 117.

20 C.F.R. § 410.424 ("Determining total disability: Medical criteria only") and 20 C.F.R. § 410.426 ("Determining total disability: Age, education, and work experience criteria"). Section 410.426(a), among other things, states that a miner "shall be determined to be under a disability *only* if his *pneumoconiosis* is (or was) the primary reason for his inability to engage in such comparable and gainful work. *Medical impairments other than pneumoconiosis may not be considered.*" [Emphasis added.]

This trail back through the body of SSA's permanent rules is just like the one followed by this Court in *Pittston Coal Group*, and the same analytic format validates Labor's rebuttal rules. The SSA rules incorporated into SSA's rebuttal section, 20 C.F.R. § 410.490(c), plainly emphasize the primary significance of medical evidence and preclude an award based on medical impairments other than pneumoconiosis. In promulgating its rules, the Labor Department simply clarified SSA's reference by incorporation but the Labor rules are not more restrictive.

In *Pittston Coal Group*, this Court reallocated burdens of proof in DOL black lung claims, finding that the agency had not allocated them correctly in writing its rules. It is a far different matter to directly change the stated purpose of the Act. This Court has recognized this in a number of cases and held that courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or frustrate the policy that Congress sought to implement. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The proper mode of construction effectuates all of the provisions of the Act. *Richards v. United States*, 369 U.S. 1, 11 (1962)). The Fourth Circuit's approach does not do so.

A review of the legislative history confirms Congress's intent to permit rebuttal in light of relevant medical evidence. The Conference Report accompanying the 1977 amendments instructs DOL to write its own interim presumption ensuring the consideration of all relevant medical evidence. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 309. Several members of the Conference Committee emphasized the point in final debate before enactment. 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits); 124 Cong. Rec. 3426, 3431 (1978) (statements of Reps. Perkins and Simon). There is absolutely nothing to indicate any intent either to limit or preclude the consideration of any kind of medical evidence or otherwise require benefit payments based on any medical impairment but pneumoconiosis.

The DOL rebuttal rules cleanly and simply carry out the intent of Congress with respect to the Black Lung Benefits Act.

III

THE COURT SHOULD NOT RESOLVE THIS LITIGATION BY DUMPING LIABILITY ON THE TRUST FUND

On rehearing in the Third Circuit, Mrs. Pauley, the petitioner in No. 89-1714, acknowledged that 30 U.S.C. § 932(c) precludes the imposition of liability on the mine operator if the operator establishes that the miner's disability or death did not arise from pneumoconiosis caused in part by the miner's employment with the operator. *Petition For Rehearing With Suggestion for Rehearing In Banc of Respondent, John C. Pauley* at 13-15, *Bethenergy Mines Inc., supra* note 2. Mrs. Pauley suggests that this provision is, however, no impedi-

ment to an award to her because the Black Lung Disability Trust Fund may not benefit from the mandate of 30 U.S.C. § 932(c). *Id.* This invitation to raid the Trust Fund for the payment of non-meritorious claims should be rejected.

Neither the Act nor anything in its legislative history contemplates any circumstance in which the eligibility criteria vary depending upon whether the claim is being defended by a mine operator or the Department of Labor on behalf of the Trust Fund. The Trust Fund merely stands in for the operator if the operator refuses to pay, or if the miner was last employed prior to January 1, 1970, or if no mine operator can be identified. 30 U.S.C. § 934, 26 U.S.C. §§ 9501(d)(1)(B), 9501(d)(2) The concern that prompted Congress to specifically commit the Trust Fund to pay benefits for the oldest claims and where "there is no operator who is required to secure the payment of such benefits", *id.*, focused on corporate changes within the industry that made the identification of a liable operator difficult or impossible. *See Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 949-50 (5th Cir. 1979). There clearly was no intent here to discriminate in entitlement determinations depending upon whether or not a specific mine owner could be held liable.

Congress's intent to merely place the Trust Fund in the shoes of the operator is confirmed in 30 U.S.C. § 932(a) where all procedural rights and obligations conferred on operators by the incorporated provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988), are deemed to apply to the Trustees of the Fund as well. *See Republic Steel Corp. v. U.S. Department of Labor*, 590 F.2d 77, 79 (3d Cir. 1978). There is no case or statement in the Act or elsewhere supporting the proposition that miners have more rights when the Trust Fund, rather than an employer, is the defendant.

It is equally important that the Trust Fund's obligations are ultimately paid by individual mine operators even though an individual mine operator may have no right to defend a claim for which the Trust Fund may be liable, 30 U.S.C. § 934(b)(1)(B). Use of coal tax revenues derived from those operators to pay benefits cannot be squared with 30 U.S.C. § 932(c) simply because it is the Trust Fund that is the claim defendant. Individual mine operators should not pay, directly or indirectly, claims that do not involve total disability or death due to pneumoconiosis.[24]

The theory proposed in this regard is also clearly inconsistent with the language and intent of the Act, and it should be rejected for this reason.

[24]Were the Court to accept the theory of Trust Fund liability in the absence of disease or related disability, it too would violate the plainly stated purpose of the Act set forth in 30 U.S.C. § 901(a).

CONCLUSION

The Fourth Circuit's decisions are wrong for the reasons set forth and would impose substantial unwarranted burdens on the coal industry. Therefore, the judgments should be reversed. The decision of the Third Circuit is correct and should be affirmed.

Respectfully submitted,

William E. Hynan
(Counsel of Record)
Peter A. Gabauer, Jr.
National Coal Association
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2643

Counsel for Amicus Curiae
National Coal Association

December 1990